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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The findings of fact and conclusions of law of the district court (App. A, *infra*, 1a-32a) are not reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 33a-35a) was entered on July 27, 1979. A notice of appeal (App. C, *infra*, 36a-37a) was filed on August 22, 1979. On October 12, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and

including November 20, 1979, and on November 14, 1979, Mr. Justice Stevens further extended the time for docketing the appeal to and including December 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTION PRESENTED

Whether Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), violates the Due Process Clause of the Fifth Amendment because it distinguishes between classes of annuitants, with respect to the amount of benefits they receive, based on their length of service and current affiliation with the railroad industry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), is set out in Appendix D, *infra*, 38a-43a.

STATEMENT

1. The Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* ("the 1974 Act"), provides retirement and related benefits to individuals who have been em-

ployed for at least 10 years in the railroad industry. 45 U.S.C. 231a(a)(1). Railroad retirement benefits are distinct from, but interwoven with, benefits received under the Social Security Act, 42 U.S.C. 401 *et seq.*[1] Some explication of this relationship and of the manner in which railroad retirement benefits are calculated is necessary to expose the clear error of the district court's decision.

a. In 1951, Congress provided for a system of financial interchange between the two programs, under which the Railroad Retirement Account was, in effect, reinsured by the Social Security Account.[2] Under this arrangement, which is still in effect, funds are transferred each year from the Railroad Retirement Account to the Social Security Account in an amount equal to the social security taxes that would have been paid by the railroads and their employees if railroad service were covered by the Social Security Act. In return, funds are transferred from the Social Security Account to the Railroad Retirement Account each year in an amount equal to the benefits that would have been paid under the Social Security Act to retired railroad employees, their de-

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[1] Railroad employees are not covered by the Social Security Act. See 42 U.S.C. 410(a)(9).

[2] See generally S. Rep. No. 93-1163, 93d Cong., 2d Sess. 2-3 (1974); H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2-3 (1974); *The Railroad Retirement System: Its Coming Crisis, Report of the Commission on Railroad Retirement*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 3-21, 51-75, 167-180 (1972) (hereinafter *Report of the Commission on Railroad Retirement*).

pendents, and survivors if the employees' railroad service were covered by the Social Security Act. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). As explained below, however, these payments from the Social Security Account are reduced in certain instances.

Prior to 1975, an individual who had been employed outside the railroad industry for a sufficient period to qualify for benefits under the Social Security Act could receive social security benefits in addition to the railroad retirement benefits to which he was entitled by virtue of his 10 years or more of railroad service. However, in order to prevent the payment of multiple benefits from the Social Security Account, the annual payment from that Account to the Railroad Retirement Account on behalf of an individual receiving dual benefits was reduced by the total of the benefits that that individual received directly from the Social Security Account for his nonrailroad work. And because the Social Security Act grants proportionately greater benefits than does the Railroad Retirement Act to persons with relatively short periods of service and low wages, the reduction in the payment from the Social Security Account to the Railroad Retirement Account on behalf of an individual receiving benefits under both programs was disproportionately large. The excess cost of dual benefits was, accordingly, borne entirely by the Railroad Retirement Account. See H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2-3 (1974). S. Rep. No. 93-1163, 93d Cong., 2d Sess. 2-3 (1974).

As a result of this statutory scheme, employees who received dual benefits caused a considerable net drain on the Railroad Retirement Account. This drain was one of several factors, including reduced railroad employment and rising benefits, that led Congress to voice concern about the financial soundness of the railroad retirement system. See S. Rep. No. 93-1163, *supra*, at 2-3; H.R. Rep. No. 93-1345, *supra*, at 2-3. *Report of the Commission on Railroad Retirement* 3-21, 51-75, 107-130, 361-366 (note 2, *supra*).

b. Against this background, Congress in 1970 created the Commission on Railroad Retirement to study the actuarial soundness of the railroad retirement system. Pub. L. No. 91-377, Section 7, 84 Stat. 792-794. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574 n.3. The Commission's final report, which was submitted to Congress on June 30, 1972, recommended that the basic railroad retirement annuity be divided into two components, one to correspond to the level of social security benefits non-railroad workers receive and the other representing an additional component for railroad service. *Report of the Commission on Railroad Retirement* 22-23, 502-503. The Commission also recommended that the "windfall" accruing to persons receiving railroad retirement and social security benefits should be eliminated in the future, both because of the financial drain dual benefits created on the Railroad Retirement Account and because of what the Commission perceived to be the unfairness resulting when employees who split their careers be-

tween railroad and non-railroad work received greater retirement benefits than employees who spent their entire careers in the railroad industry. *Id.* at 344-345, 349-357, 366-367. However, the Commission also recommended the inclusion of special transitional or "grandfather" provisions to protect, in varying degree, the expectations of employees or retired employees who were already receiving, would soon be eligible to receive, or anticipated future receipt of benefits under both the social security and railroad retirement programs. *Id.* at 367-369.

Following receipt of the Commission's proposals, Congress requested representatives of railroad employees, retirees, and carriers to submit a report containing their recommendations for measures to ensure the solvency of the railroad retirement system, based upon their negotiations and taking into account the specific recommendations of the Commission. Pub. L. No. 92-460, Section 6, 86 Stat. 767. That report was submitted to Congress on February 27, 1973. It called attention to the complexities of the problem and indicated that substantial progress had been made in arriving at mutually agreeable solutions. See H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27. Congress then requested representatives of management and labor to develop and submit recommendations in the form of a draft bill. Pub. L. No. 93-69, Section 107, 87 Stat. 165. The bill eventually introduced and (with some modifications not directly relevant to the question pre-

sented in this case) enacted as the Railroad Retirement Act of 1974 was based on the recommendations of the Joint Labor-Management Negotiating Committee. H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27.[3]

c. The Railroad Retirement Act of 1974 followed the suggestion of the Commission on Railroad Retirement that the retirement annuity be divided into components, one corresponding to social security benefits and the other a supplemental benefit attributable to railroad service. In this respect, as the Court noted in *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574, the Act resembles both a private pension program and a social welfare plan. The upper, and smaller, tier of an annuity under the Act is tied to the employee's earnings and career service in the railroad industry alone. 45 U.S.C. 231b(b); 45 U.S.C. 231a(b). The lower, and larger, tier corresponds to the total benefits that the employee would receive if his railroad retirement service were covered by the Social Security Act. 45 U.S.C. 231b(a).

The "social security component" is computed on the basis of the employee's combined railroad and nonrailroad service. 45 U.S.C. 231b(a). However, if the employee is also eligible to receive benefits under

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[3] The process by which the bill was introduced following industry negotiations was not novel. The Railroad Retirement Act of 1937 was also the product of extensive negotiations between management and labor following presidential intervention. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574 n.3. *Report of the Commission on Railroad Retirement* 58.

Title II of the Social Security Act because he was employed outside the railroad industry for a sufficient period of time to be permanently insured under that Act, the "social security component" of his railroad retirement annuity is reduced by the amount he is paid directly from the Social Security Account for his non-railroad service. 45 U.S.C. 231b(m).

The offset provision in 45 U.S.C. 231b(m), under which an annuity is reduced by the amount of actual social security benefits received, effectively eliminates the accrual and receipt of dual benefits under the two programs in the future, as the Commission on Railroad Retirement had recommended. But Congress did include in the 1974 Act transitional protection for employees who were already receiving dual benefits or, in certain situations, had an expectation of doing so at the time the new legislation was adopted. This protection, which is embodied in the form of yet a third component or tier of benefits (commonly called the "windfall component" because of its favorable ratio of benefits received to taxes paid) is available in some situations in which the annuity has been reduced pursuant to the offset provision in 45 U.S.C. 231b(m).

In order to qualify for any "windfall component," the retired employee must have completed 10 years of railroad service and have been permanently insured under the Social Security Act on one of two dates. If the retired employee performed some creditable railroad service in calendar year 1974, had a "current connection with the railroad industry" as

of December 31, 1974 (or such later date as he retired),[4] or had completed 25 years of railroad service as of December 31, 1974, he would be entitled to a "windfall" benefit if he had completed 10 years of railroad service and was permanently insured under the Social Security Act as of December 31, 1974. 45 U.S.C. 231b(h)(1). However, if the retired employee left the railroad industry before 1974 without having completed 25 years of service and did not retain a "current connection" with the industry at the close of 1974, he would be entitled to a "windfall" benefit, lesser in amount, only if he had completed 10 years of railroad service and was permanently insured under the Social Security Act on the date he left the railroad industry.[5] 45 U.S.C. 231b(h)(2). Thus, a

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[4] The term "current connection with the railroad industry" is defined in 45 U.S.C. 231(o) to mean employment in the industry in 12 of the preceding 30 calendar months. Thus, an employee who left the railroad industry well before 1974 but who was reemployed in the industry after 1974 in 12 of the 30 months prior to his retirement is eligible to receive a "windfall" benefit if he was "vested" under both programs as of December 31, 1974.

[5] The amount of the "windfall" component is greater under subsection (h)(1) than under subsection (h)(2). The former component consists of a social security level benefit based on social security service through December 31, 1974, plus a social security level benefit based on railroad service through December 31, 1974, minus a social security level benefit based on combined social security and railroad service through December 31, 1974. The formula used under subsection (h)(2) is similar, except that only social security service through the date the individual left the railroad industry, rather than through December 31, 1974, is used in computing the amount of the benefit. This difference in the

retired employee who left the railroad industry for other employment before 1974 and was not permanently insured under the Social Security Act when he did so could not receive *any* "windfall" benefit, even if he subsequently performed sufficient non-railroad service to become permanently insured under the Social Security Act by December 31, 1974.

2. On July 26, 1976, L. Jackson Lipp and William D. Gibson filed a class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U.S.C. 231b (h) irrationally distinguishes between classes of annuitants based solely on whether the annuitant had a current connection with the railroad industry and is therefore unconstitutional under the Due Process Clause of the Fifth Amendment. The government moved to dismiss on October 8, 1976, arguing, *inter alia*, that because the named plaintiffs were not yet eligible to retire, they did not have standing to raise the constitutional issue. An amended complaint was filed on December 8, 1976, with appellee Gerhard Fritz, a retired railroad worker who had left the industry in 1956 and was not receiving any "wind-

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date through which social security service is counted corresponds, of course, to the difference in the date by which the retired employee must have been permanently insured under the Social Security Act in order to be eligible for any "windfall" benefit under the two subsections.

fall" benefit, as an additional named plaintiff.[6] The district court eventually certified a class, represented

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[6] The original complaint, filed on July 26, 1976, sought declaratory relief and an order requiring that the plaintiff class's annuity be computed on the same basis as the annuity of those who had worked in the industry in 1974 or had a current connection with the industry. The amended complaint, filed on December 8, 1976, sought essentially similar relief. However, the district court, by order dated October 16, 1978, determined that the amended complaint should not relate back to July 26, 1976, for purposes of the three-judge court provision in 28 U.S.C. 2282. That provision was repealed on August 12, 1976, except as to actions commenced on or before that date. Pub. L. No. 94-381, Section 7, 90 Stat. 1120. The district court therefore declined to seek the convening of a three-judge court.

This Court has jurisdiction of this appeal under 28 U.S.C. 1252, even if the district court erred in failing to convene a three-judge court. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); see also *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). If the Court were to conclude that a three-judge court should have been convened, the proper course would be to vacate the judgment below and remand with directions to convene a three-judge court. *McLucas* v. *DeChamplain, supra*, 421 U.S. at 32 n.12.

However, we agree with the district court's determination that a three-judge court was not required in this case. The principal purpose of Rule 15(c), Fed. R. Civ. P., which provides for the relation back of a complaint in some circumstances, is to ensure that a cause of action is not barred by the statute of limitations where a defendant had adequate notice and is not otherwise prejudiced. Advisory Committee's Note to Proposed Amendment to Rule 15, Fed. R. Civ. P., 39 F.R.D. 73, 82-84 (1966). No statute of limitations question is presented here. Relation back is relevant to this case only with respect to application of the three-judge court provi-

by appellee Fritz, of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were not eligible to receive any "windfall" benefit (App. A, *infra*, 2a).

3. On cross motions for summary judgment, the district court held that 45 U.S.C. 231b(h) creates an irrational and unconstitutional distinction between classes of annuitants. It therefore ordered that members of appellee's class be paid the full "windfall" benefit payable under 45 U.S.C. 231b(h)(1). See App. B, *infra*, 33a-34a.[7]

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sion, which is to be strictly construed. *Mitchell* v. *Donovan*, 398 427, 431 (1970).

Moreover, the only named plaintiffs in the original complaint were not yet eligible to receive retirement benefits. They are therefore not members of the class eventually certified by the district court and are not parties to the present appeal. Appellee Fritz, who was determined by the district court to be a proper representative of the certified class and who is a party to the present appeal, was named only in the amended complaint—presumably in response to the government's motion to dismiss the original complaint on the grounds that the named parties did not have standing to bring the action because they were not yet eligible to receive retirement benefits. Under these circumstances, the district court did not err in declining to order that the amended complaint relate back to the date of the original complaint for purposes of the three-judge court provision.

[7] The district court's certification of a class of former railroad employees who had retired by January 31, 1977, avoided the issue, raised by the government in its motion to dismiss the first complaint, that persons who had not yet retired and were therefore not yet eligible to receive railroad retirement benefits suffered no actual injury entitling them to bring the present suit. The district court nevertheless concluded

The district court acknowledged that the distinction drawn by Congress with respect to the total amount of benefits a retired employee could receive does not constitute deprivation of a fundamental right or impose a burden based upon suspect criteria and that the discrimination against appellee's class must therefore be "arbitrary, capricious and irrational before such discrimination can be held unconstitutional" (App. A, *infra*, 28a). The court stated, however, that the rationality of the classification must be judged against the purposes sought to be accomplished by the legislation. Finding that the

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that its holding that 45 U.S.C. 231b(h) unconstitutionally distinguishes between annuitants would apply equally to railroad employees who retired after January 31, 1977 (App. A, *infra*, 31a-32a). The court, in its judgment, therefore ordered plaintiffs to initiate proceedings to compel the Railroad Retirement Board to prepare a plan (if the Board did not prepare such a plan on its own initiative) for the payment of benefits to the members of this "general class" of all employees who retired after January 31, 1977, in the same manner as the court had ordered benefits payable to the members of the certified class (App. B, *infra*, 34a-35a).

Because the certified class was defined to include former railroad employees who were receiving no "windfall" benefits, the judgment of the district court does not by its terms hold unconstitutional the distinction in 45 U.S.C. 231b(h)(1) and (2) with respect to the amount of "windfall" benefits that may be received by retired employees who are entitled to receive some such benefits. However, the reasoning of the district court, discussed below, would appear to require the conclusion that retired employees receiving the lesser benefit under subsection (h)(2) are likewise entitled to receive the full benefit payable under subsection (h)(1). It is apparent, then, that the decision of the district court will have implications well beyond the effects on the certified class.

purposes of the 1974 Act "were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons entitled before December 31, 1974, to receive their full benefits under both Social Security and Railroad Retirement earned and 'vested' under the previous law" (*ibid.*), the court concluded (*id.* at 30a) that the discrimination against appellee was not rationally related to the congressional purpose.

The district court relied primarily on the recommendations of the Commission on Railroad Retirement in support of its conclusion that the 1974 Act had the purpose to "protect completely" the dual benefits of railroad employees. The court conceded (App. A, *infra*, 14a-15a, 18a-19a, 30a) that the Joint Labor-Management Negotiating Committee had departed from this aspect of the Commission's proposal by recommending that Congress treat retirees in appellee's position in the manner mandated by the plain language of 45 U.S.C. 231b(h). But the court found (App. A, *infra*, 30a) that this departure was motivated by a desire on the part of the labor negotiators on the Joint Committee to increase future benefits for persons still in the railroad industry at the expense of those, such as appellee, who had left. In the court's view (*ibid.*), this breach of what it characterized as the "railroad labor union's duty of fair representation" owed to appellee heightened the arbitrariness, capriciousness and irrationality of the distinction drawn in 45 U.S.C. 231b(h).

Finally, the court was influenced by what it found to be the Joint Committee's inadequate explanation of its recommendation to Congress, the failure of the Joint Committee and the Railroad Retirement Board to notify representatives of appellee's class of the proposed changes, and the failure of the responsible committees of Congress to invite representatives of appellee's class to testify regarding the legislation (App. A, *infra*, 13a, 15a, 17a-19a). In sum, the court found that Congress did not understand the law it enacted, in part because of what it considered to be the Joint Committee's obfuscation, and that this factor bore "adversely on the rationality of a statutory discrimination between similarly situated persons" (*id.* at 30a).

THE QUESTION IS SUBSTANTIAL

The district court has held that an Act of Congress is unconstitutional. This decision is in error, because Congress had a rational basis for distinguishing between annuitants, based on their years of service or current affiliation with the railroad industry, in the award of "windfall" Railroad Retirement Act benefits. The question presented involves substantial sums of money and affects large numbers of persons.[8] Review by this Court is therefore appropriate.

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[8] The Railroad Retirement Board estimates that the invalidation of the distinction drawn in Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), would result in the annual payment of an additional $119 million in "windfall" benefits for each of the next 20 years.

1. As the district court recognized (App. A, *infra*, 31a), railroad retirement benefits, like social security benefits, are not contractual in nature and may be altered or even eliminated by Congress at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575. See also *Flemming* v. *Nestor*, 363 U.S. 603, 610-611 (1960). Accordingly, Congress could have eliminated dual benefits under the Social Security and Railroad Retirement Acts by failing to include any "windfall component" in the 1974 Act for all employees, including those who had already begun to receive dual benefits under prior law. However, Congress took the far less drastic step of eliminating dual benefits in the future only with respect to railroad employees who were not permanently insured under the Social Security Act and did not have 10 years of railroad service as of December 31, 1974, or upon such earlier date as they may have left the railroad industry. For those who did meet either of these threshold requirements, Congress further distinguished among annuitants on the basis of the relative strength or duration of their ties to the railroad industry in 1974 or on the date of their subsequent retirement. The Due Process Clause does not preclude Congress from choosing this reasonable middle ground when it would have been free to eliminate dual or "windfall" benefits altogether.

2. The distinctions drawn in the Railroad Retirement Act of 1974 on the basis of an employee's ties to the railroad industry do not burden fundamental rights or create classifications that rest upon suspect

criteria. *Vance* v. *Bradley*, 440 U.S. 93, 96-97 (1979); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 40 (1973). Hence, the statutory classification in 45 U.S.C. 231b(h) is unconstitutional only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, *supra*, 440 U.S. at 97. See also *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (1975). As the Court stated in *Flemming* v. *Nestor*, *supra*, 363 U.S. at 611:

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Here, Congress could rationally have concluded that those who had 25 years of service in the railroad industry, had worked in the industry in 1974, or had a current connection with the industry at the end of that year or at the time of their subsequent retirement had somewhat stronger equities in retaining the "windfall" of dual benefits afforded by the Railroad Retirement Act than did people who had left the in-

dustry and no longer had such ties.[9] Indeed, this is precisely the basis on which the Joint Labor-Management Negotiating Committee recommended the formulation in the present 45 U.S.C. 231b(h) to Congress in 1974. See *Restructuring of the Railroad Retirement System: Hearings on H.R. 15301 Before the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 168 (1974). Once it is conceded, as it must be, that Congress may appropriately draw a line somewhere in establishing threshold qualifications for retirement benefits,[10] Congress' choice here, conditioning eligibility for an additional annuity component on the character and duration of an

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[9] The "current connection" test has also been utilized since 1966 in determining a retiree's eligibility for a special supplemental annuity available only to persons with 25 years of service in the industry. See 45 U.S.C. 231a(b)(1)(iv). This was intended as a reward for career service in the industry. See *Railroad Retirement Act—Supplemental Benefits: Hearing on H.R. 17285 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 16, 36 (1966). The "windfall" benefit involved in this case may likewise be viewed as a reward for career service.

[10] Thus, a person can receive no benefits under the Railroad Retirement Act unless he has at least 10 years of service in the industry, 45 U.S.C. 231a(a), and he is not entitled to any "windfall" benefit unless he had accrued those 10 years of service by at least December 31, 1974, 45 U.S.C. 231b(h).

Congress established the 10-year eligibility requirement for the receipt of any railroad retirement benefits in 1951. Ch. 234, Section 2, 65 Stat. 683. Prior to that time, persons with less than 10 years of railroad service had been eligible to receive a railroad retirement annuity. Thus, contrary to the district court's findings of fact (App. A, *infra*, 6a), 45 U.S.C. 231b(h) does not represent Congress' first restriction on receipt of railroad retirement benefits already "earned."

employee's ties to the industry, is not unconstitutional merely because appellee or a court would have drawn the line elsewhere. *Mathews* v. *Diaz*, 426 U.S. 67, 82-84 (1976).[11]

3. None of the reasons offered by the district court supports its contrary finding that Congress lacked a rational basis for enacting 45 U.S.C. 231b(h).

a. The court concluded, first, that the purpose of the 1974 Act was to "protect completely" the expectations on the part of *all* persons who had 10 years of railroad service and were fully insured under the Social Security Act as of December 31, 1974, that they would receive full dual benefits upon retirement (App. A, *infra*, 28a). In the court's view (*id.* at 30a), the distinction in Section 231b(h) that resulted in elimination of "windfall" benefits for the members of appellee's class was not reasonably related to this purpose. The court erred, however, in its characterization of the purposes underlying the 1974 Act. Although the Commission on Railroad Retirement did initially recommend that the benefits of persons in appellee's position not be reduced, Congress was not

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[11] In particular circumstances, the bright line drawn by Congress may produce what appear to be somewhat inequitable results. For example, an individual with 24 years' service in the railroad industry who took another job in 1972 would receive a smaller windfall annunity than an individual with 10 years' railroad service who left the industry in 1965 but came back to work one day in 1974. It is no objection to a statutory classification, however, that "such rules [may] produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, *supra*, 434 U.S. at 53. Congress was entitled to legislate with the generality of cases in mind.

obliged to accept this recommendation, and it in fact declined to do so.

As note above (see pages 6-7, *supra*), following submission of the Commission's report, Congress solicited the views of labor and management in the railroad industry. The Joint Labor-Management Negotiating Committee suggested a refinement of the Commission's recommendation, under which individuals who left the industry prior to 1974 and had no current connection to it would receive either a lower "windfall component" than those who remained in the industry or no "windfall component" at all. Representatives of the Joint Committee expressly addressed this aspect of their recommendation in their presentation to Congress and explained that this refinement "reflect[s] more accurately the comparative equities of the two groups." *Hearings on H.R. 15301*, *supra*, at 168-169. Moreover, the reports of the House and Senate Committees that considered the legislation each discussed this varying manner of treatment of those who were entitled to dual benefits under prior law (see H.R. Rep. No. 93-1345, *supra*, at 12, 38-40; S. Rep. No. 93-1163, *supra*, at 12, 38-39), including the requirement that the employee be "fully insured under the Social Security Act on December 31, 1974, or, in certain cases, as of the end of the year prior to 1974 in which the employee last engaged in railroad service," in order to be eligible for any "windfall component." H.R. Rep. No. 93-1345, *supra*, at 38; S. Rep. No. 93-1163, *supra*, at 38.

Thus, the legislative history conclusively refutes the district court's critical assumption that the intent of Congress in enacting the Railroad Retirement Act of 1974 was to "protect completely" appellee's right to continued dual benefits. By the same token, the plain language of Section 231b(h), in addition to the committee hearings and reports, disprove the court's finding (App. A, *infra*, 30a) that Congress was "unaware" of what it enacted, even assuming that a court may look behind the language of a statute to determine whether individual legislators may have misunderstood the distinctions they have created and that such an exercise would have any bearing on the constitutionality of the distinctions. See *Vance* v. *Bradley*, *supra*, 440 U.S. at 111; *Barrett* v. *United States*, 423 U.S. 212, 217 (1976) ("Congress knew the significance and meaning of the language it employed.").

b. The district court also erred in attaching significance to the manner in which the Joint Labor-Management Negotiating Committee developed its recommendations. Contrary to the district court's apparent understanding (App. A, *infra*, 10a, 12a-13a), the Joint Committee was not directed to adhere to the recommendations of the Commission on Railroad Retirement; it was required merely to take them into account. See Pub. L. No. 93-69, Section 107(c)(1), 87 Stat. 165. But in any event, the issue here is the constitutionality of an Act of Congress, not the Joint Committee's fidelity to its mission. Even if the failure of the labor representatives on

the Joint Committee to insist on absolutely equal benefits for persons such as appellee was considered to be a violation of the unions' duty of fair representation in a collective bargaining context (but see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-343 (1953)), that defect would have no bearing on the constitutionality of the provisions Congress enacted.[12]

c. Finally, the district court concluded that the savings provided to the Railroad Retirement Account did not justify reducing appellee's benefits, particularly because employees such as appellee had contributed to their entitlement in accordance with the law as it existed prior to December 31, 1974, and because other methods were available to Congress to correct whatever fiscal problems existed in the railroad retirement system. However, it is beside the point that appellee may have met the threshold eligibility requirement for dual benefits upon retirement under prior law, because, as noted above, Congress

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[12] The district court also found that representatives of appellee's class were not notified of the changes recommended by the Joint Committee, were not notified by the Railroad Retirement Board prior to passage of the 1974 Act that their benefits might be reduced, and were not asked to testify before the responsible congressional committees (App. A, *infra*, 13a, 15a). These findings likewise are irrelevant to the constitutionality of the statute. We note, however, that if the district court is correct in its assertion that the distinctions drawn in Section 231b(h) are merely the result of legislative oversight, appellee and the class he represents can secure complete relief by requesting Congress to remedy the unintentional discrimination. Cf. *Vance* v. *Bradley*, *supra*, 440 U.S. at 97 & n.12.

can modify or repeal the benefit provisions at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575.

Moreover, the district court's assumption that Congress must have diminished appellee's "windfall" benefits solely to provide savings to the Railroad Retirement Account is in error. Congress presumably shared the view of the Joint Committee that individuals who left the industry had a diminished equitable claim to "windfall" benefits, and it could have determined to reduce appellee's benefits for that reason alone, without regard to the savings produced. Indeed, it is significant that the "windfall" benefits payable under 45 U.S.C. 231b(h) are to be paid out of appropriated funds through the year 2000, rather than out of the special employment taxes paid by railroad carriers and employees. See 45 U.S.C. 231n(d).

But even if the district court's factual premise that Congress acted solely to save money or relieve the Railroad Retirement Account of an additional financial burden were correct, the determination to do so certainly does not render the legislative action unconstitutional. The decision to save what the Railroad Retirement Board has estimated to be some $2.38 billion over the next 20 years (see note 8, *supra*) by decreasing or eliminating future "windfall" benefits to those employees whom Congress believed to have a reduced claim to such benefits was within the range of available options. Congress may well have had other means to ease the stress on the Railroad

Retirement Account, but the choice of which way to proceed in allocating social welfare benefits is a legislative, not a judicial, judgment.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1979

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for hearing before this Court on the parties' cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the evidence submitted by the parties and having considered the parties' briefs and arguments now finds there is no genuine issue as to any material fact and that the facts and conclusions of law thereon are as follows:

I. FINDINGS OF FACT

A. *The Parties.*

1. The class representative plaintiff, Gerhard H. Fritz ("Fritz"), is a former railroad employee with

17 years service. Fritz has been fully retired since October 1, 1976, and therefore is presently entitled to receive both Railroad Retirement and Social Security benefits.

2. Fritz is the duly certified class representative plaintiff in this cause of action of a class of persons who have all the following attributes:

> (a) Its members did not have a current connection with the railroad industry as of December 31, 1974, nor did such members work for the railroad industry in calendar year 1974;
>
> (b) Its members had less than 25 years but more than 10 years of credited railroad service as of December 31, 1974;
>
> (c) Its members were not receiving Railroad Retirement benefits as of December 31, 1974;
>
> (d) Its members filed applications for Railroad Retirement annuities after December 31, 1974;
>
> (e) Its members were entitled to the receipt of such annuities beginning on or before January 31, 1977;
>
> (f) Its members have been determined to be entitled to Railroad Retirement annuities and Social Security benefits but not to a so-called "windfall" amount as computed under Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231b(h).

3. The defendant, the United States Railroad Retirement Board, is an agency of the United States and is responsible for the administration of the Railroad Retirement Act of 1974, 45 U.S.C.A. § 231 *et seq.*

B. *The History of Railroad Retirement.*

4. The railroad industry was one of the first in the United States to initiate pension programs for its employees. The private pension plans established by the railroads, however, had a number of deficiencies to which railroad labor unions objected.

5. To remedy the deficiencies of such programs, the railroad labor unions attempted to organize their own plans. These attempts, however, did not meet with success.

6. The railroad unions then sought Congressional support for the enactment of a pension plan with a federal overseer.

7. The railroad union's efforts resulted in the Railroad Retirement Act of 1934. This Act was a forerunner of the present Railroad Retirement system.

8. The Railroad Retirement Act of 1934 created the defendant federal agency, the United States Railroad Retirement Board.

9. The railroad companies contested the constitutionality of the Railroad Retirement Act of 1934 and succeeded in obtaining a ruling from the United States Supreme Court that the Railroad Retirement Act of 1934 was unconstitutional.

10. Following the Supreme Court's ruling on the Railroad Retirement Act of 1934, Congress enacted the Railroad Retirement Act of 1935. The railroad companies again, however, initiated a constitutional challenge to that act.

11. Before the challenge to the Railroad Retirement Act of 1935 could be heard by the Supreme

Court, the railroad companies and the railroad labor unions reached an agreement on the creation of a federally sponsored pension plan for industry members. This agreement resulted in the Railroad Retirement Act of 1937.

12. The Railroad Retirement Act of 1937 was the basic federal railroad retirement law as amended from time to time until the enactment of the Railroad Retirement Act of 1974.

13. Under the Railroad Retirement Act of 1937, employment in the railroad industry at a time before the enactment of the aforementioned railroad retirement acts was counted for purposes of entitlement to railroad retirement benefits. In addition, the Railroad Retirement Act of 1937 required no offset for the receipt of earned Social Security benefits.

14. The next major change in the Railroad Retirement system relevant to this controversy occurred in 1951. At that time Congress by appropriate legislation initiated a "Financial Interchange" between Social Security and Railroad Retirement.

15. Under the Financial Interchange, the Railroad Retirement Board pays to Social Security each year an amount equal to the taxes which would have been paid by all railroad employees, and by the railroads, if railroad service were service covered under the Social Security Act. Social Security, on the other hand, transfers to the Railroad Retirement system each year an amount equal to the total of Social Security benefits which would have been paid to all retired railroad employees, their dependents, and sur-

vivors if all railroad service of the employees since 1936 had been service covered under the Social Security Act.

16. The Financial Interchange has resulted in a net flow of monies from Social Security to Railroad Retirement. Indeed, the purpose of the interchange was to insure that the Social Security system would neither gain nor lose from the existence of a separate Railroad Retirement system, and to fund higher railroad benefits.

17. Also in 1951, Congress enacted into law a restriction on the concurrent receipt by a railroad pensioner of Railroad Retirement and Social Security benefits (hereinafter referred to as "earned dual benefits"). Pub. L. No. 82-234 (1951).

18. Congress thus created an offset for concurrent Social Security and Railroad Retirement benefits to the extent that such benefits were the result of credit given by both Railroad Retirement and Social Security for pre-Social Security and pre-1937 Railroad Retirement service, and, of course, before the railroad employee could have made any Railroad Retirement or Social Security contributions.

19. Under the 1951 amendment to the basic 1937 Act, if a railroad employee had no Social Security service, no offset would be applied.

20. By this restriction, Congress for the first time ever, eliminated a portion of a Railroad Retirement benefit which had been previously granted. As the historical evidence shows, a great hue and cry among the affected pensioners followed.

21. Thereafter in 1954, the 1951 restriction on dual benefits was repealed by Congress and made retroactive to wipe out completely the effects of the 1951 restriction.

22. The reasons for Congress' repeal of this restriction are as applicable today to the 1974 divestment as they were in 1954. These reasons as set forth in the legislative history of the 1954 Act are as follows:

> (a) Railroad employees believed that benefits once granted would not be reduced;
>
> (b) The dual benefits restriction was inequitable to those former railroad employees who were compelled to seek Social Security employment;
>
> (c) The dual benefits restriction created an inequity between railroad employees and persons covered by other federal retirement systems;
>
> (d) The dual benefits restriction created inequities between railroad employees and employees in other industries;
>
> (e) The dual benefits restriction created administrative difficulties for the Railroad Retirement Board; and
>
> (f) The dual benefits restriction discriminated against a special class of retired employees.

23. Prior to the enactment of the Railroad Retirement Act of 1974, the 1951 restriction or offset was the only previous attempt to actually eliminate a portion of an already existing Railroad Retirement benefit in the entire history of the Railroad Retirement system.

24. The two divestments are not, however, identical. The 1974 divestment works a more invidious discrimination in that it eliminates earned benefits as opposed to the elimination of unearned benefits involved in the 1951 divestment.

25. Unlike those injured by the 1951 Act, the plaintiff class not only had a statutory right to the full benefit (as did the 1951 class), but the plaintiff class also actually earned the benefit by making full employee contributions to the Railroad Retirement fund in compliance with the requirements of the Railroad Retirement Act of 1937. The 1951 class, on the other hand, had not earned, by contributions to the Railroad Retirement fund or Social Security funds, the credit given them for pre-1937 service.

26. The Financial Interchange mentioned in paragraphs 14-16 above, resulted in net payments to Railroad Retirement from Social Security, from 1937 to 1974 of 8.2 billion dollars. Despite this rather large transfer, it became apparent in the late sixties that the Railroad Retirement system was underfunded.

C. *The Commission on Railroad Retirement.*

27. In 1970, Congress by Pub. L. No. 91-377, 84 Stat. 791 (1971) established the Commission on Railroad Retirement to make a full study of the Railroad Retirement system and to recommend to Congress methods of making its pension fund actuarially sound.

28. Congress directed that the Commission be composed of five members with only one railroad management representative and one railroad union representative. The other three were to be representatives of the public. Of these five members, three were appointed by the President of the United States, one by the Speaker of the House, and one by the President Pro Tem of the Senate.

29. The Railroad Retirement Commission, after a thorough study of the system, submitted its written report to Congress on June 30, 1972.

30. One of the Commission's principal recommendations was that railroaders, in the future, no longer be permitted to earn and acquire full Social Security and full Railroad Retirement benefits without having their Social Security benefits offset against their Railroad Retirement benefits.

31. Another of the four principal recommendations of the Commision was that all those people with "vested" pension rights (including by definition all members of plaintiff Fritz' class) continue to have all their benefits, acquired under Railroad Retirement and Social Security prior to the date of changeover to a new Railroad Retirement system, completely preserved. This recommendation reads in pertinent part as follows:

> Recommendation 9-2: (a) The following principles with respect to vested rights should be followed in instituting changes to eliminate further accrual of rights to windfalls in dual OASDI benefits on the basis of future service:
>
> . . .

(3) Individuals who have vested rights to social security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under railroad retirement, should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits, as described in chapter 11. . . . COMMISSION Report, 368.

32. "Vested" was defined by the Commission precisely to include plaintiff Fritz' class. This definition reads as follows:

Legally Vested. As used in the text of this report, legally vested benefits refers to the status of currently or fully insured railroad workers under social security as of the transition or changeover date to a new two-tier railroad retirement system, with respect to their entitlement to a guaranty of their OASDI dual benefits accrued before the date of changeover.

. . .

Vested Benefit. A benefit the payment of which is not contingent upon a participant's continuation in specified employment;

Vesting. The attainment by a participant of a benefit right attributable to employer contributions, not contingent upon the participant's continuation in specified employment. In the RR system an employee is fully vested when he obtains 120 creditable service months. COMMISSION REPORT, 522 & 555.

D. *The Joint Management-Labor Negotiating Committee.*

33. Following receipt of the Commission's intensive and thorough report, Congress by specific legislation then directed railroad management and railroad labor to negotiate and prepare a bill to restructure the Railroad Retirement system in accordance with the specific recommendations of the Commission on Railroad Retirement. Pub. L. No. 93-69 § 107, 87 Stat. 162 (1973).

34. Unlike the Commission on Railroad Retirements, there were no representatives of the public either appointed to or present at the labor-management negotiations. Also, those people detrimentally affected by the later Railroad Retirement Act of 1974 (plaintiff Fritz' class of former railroaders) were not represented.

35. Unlike the Railroad Retirement Commission appointments, the 1974 Railroad Retirement Act management and labor negotiators were not appointed by either the President or Congress.

36. Instead, Congress allowed railway labor and railway management to make their own appointments of negotiators without review or consent of Congress. Pub. L. No. 93-69 § 107(a), 87 Stat. 162 (1973). These negotiators were termed the Joint Labor-Management Negotiating Committee (hereinafter referred to as the "JLMC").

37. To make the Railroad Retirement system actuarially sound, the JLMC had to alleviate the sys-

tem's funding deficit, which at the beginning of 1974 amounted to 9% of taxable payroll.

38. In the early negotiations of the JLMC meetings, and in accordance with the Commission's specific recommendations and the opening position of labor, railway management tentatively agreed that the plaintiff class' rights to their earned dual benefits under Railroad Retirement and Social Security were to be preserved.

39. The labor negotiators insisted, however, that the JLMC consider not only ways of removing the actuarial deficit but also ways of increasing pension benefits. These additional and contra-purpose considerations were not recommended by the Commission on Railroad Retirement.

40. The labor negotiators however demanded and they later received agreement from the railway management negotiators, as to the following additional money benefits by and through the Railroad Retirement Act of 1974 which benefits increased, rather than decreased, the actuarial deficit of the pension fund:

(a) Full supplemental annuity[1] benefits at age 60 to those retiring with 30 years service;

(b) Full spousal benefits at age 60 for spouses of employees with 30 years service; and

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[1] Supplemental annuities are added to regular annuities for railroaders who have worked for the railroad industry at least 25 years, and who were actively employed by the railroad industry upon retirement (i.e. union members). 45 U.S.C. § 231a(b)(19).

(c) Increase in benefits guaranteed for widows and other survivors from 110% of comparable Social Security benefits to 130%.

41. Until October 1973, railroad employees, including the plaintiffs class, contributed a percentage of their salary to Railroad Retirement far in excess of that being contributed by non-railroad workers to Social Security.

42. After October 1973, however, the percentage contribution of railroad workers was reduced and made equal to that of workers covered by Social Security. Thus, when Congress passed the Railroad Retirement Act of 1974 those persons then working the railroads were contributing a far smaller percentage of their salary to Railroad Retirement than had previous railroad employees.

43. Through an initially agreed upon restructuring of the benefit formula, which restructuring completely preserved the plaintiffs class' vested benefits, and through the planned receipt of the funds requested from Social Security (later from the General fund) the JLMC was able to calculate the removal of the original 9% deficiency in the Railroad Retirement Fund.

44. The increase in benefits demanded by the unions still, however, left the fund with an approximate 3% deficit. The cost of the new benefits was offset by the savings to the fund realized by directly violating one of the four principal, specific recommendations of the Commission on Railroad Retirement and eliminating Fritz' class from the protection afforded those

with "vested" earned dual benefits. Essentially, the railroad labor negotiators traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees, even though doing so violated the basic Congressional purposes of the negotiations. Furthermore, by sacrificing the plaintiff class, the railroad labor unions breached the duty of fair representation they owed to the plaintiff class, which duty resulted from the labor unions' purported representation of the plaintiff class' interests in the JLMC negotiations.

45. At no time prior to passage of the 1974 Act was plaintiff Fritz' class notified that its earned dual benefits were going to be eliminated. Indeed, the news or other information that was published and available at the time the JLMC was violating the Railroad Retirement Commission's recommendation and negotiating out plaintiffs Fritz' class indicated that all those persons who presently had rights to earned dual benefits were being fully protected.

46. There is no evidence to indicate that the Railroad Retirement Board or its field offices informed any member of the class about the potential reduction in earned benefits during the time that Congress was working on the 1974 Act.

47. Despite the aforementioned assurances of protection, the JLMC agreed in executive conference in March 1974, to eliminate the plaintiff class in exchange for the increased benefits to others then sought by the railroad labor negotiators which increased benefits are identified in paragraph 40 above.

48. The plaintiff class was removed from the class of those persons with between 10 and 25 years service and Social Security vesting who would continue their entitlement to the dual earned benefit through the JLMC's change in the definition of "vested." Although "vested" had always included all persons, including the plaintiff class, who had made the required contributions and who had met all the service requirements (COMMISSION REPORT, 552 & 555), the JLMC, to eliminate plaintiffs Fritz' class, added a new requirement that a person had to also have a "current connection" with the railroad industry or have worked in the railroad industry sometime during calendar year 1974. This new requirement bore no significance to nor any connection with the actual earning of the dual benefits.

49. By adding this new and completely arbitrary distinction the JLMC deprived the plaintiff class of their earned dual benefits while at the same time preserving them for persons possessing all the same traits as the plaintiff class (more than 10 but less than 25 years railroad service, Social Security vesting, and not yet retired) but who were also currently connected to the industry or had worked in the industry at any time in 1974. Essentially, these current employees were active union members whose elected representatives were directly involved in the negotiations as members of the JLMC.

50. After eliminating plaintiff Fritz' class and providing for increased benefits in the manner aforesaid, the JLMC on April 10, 1974, presented their

joint written proposal for a bill to save the railroad pension fund to the Congressional sponsors, Senator Williams and Congressman Staggers.

E. *Congressional Consideration.*

51. During Congressional consideration of the bill, no representative of the plaintiff class was invited to participate in the Congressional hearings nor were any of the class members notified of the impending loss of benefits.

52. In the Congressional hearings on the JLMC's draft bill, members of the JLMC were less than candid when questioned on the adverse effects their bill would have upon plaintiff's class and, indeed, led Congress to believe that the plaintiff class was protected by the Railroad Retirement Act of 1974.

> Mr. Dingell. [Congressman, D. Mich.] Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?
>
> Mr. Dempsey. [William Dempsey, Chairman, National Railroad Labor Conference and Chief Management Negotiator of the bill] Well, I don't think so really. I think this is the situation in which everybody wins. Let me explain.
>
> * * * * *
>
> Mr. Dingell. Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I applaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going to cost less but pay more benefits. Now if you have accomplished this, I

suggest we should put you in charge of the social security system.

Mr. Dempsey. Let me go back once again. I recognize that this is very complicated. It took me a long time to understand why a new benefit formula that would produce at least in the near future slightly higher benefits than the old one, could possibly save the fund a significant amount of money.

Now let me try it again. (Restructuring of the Railroad Retirement System) HEARINGS ON H.R. 15301 BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 93d Cong., 2d Sess. 199, 201 (1974).

Mr. Dempsey. . . . This part on the top is the cost of the gradual phaseout of dual benefits, that is, the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected. So this is the cost of that social production for this group of dual beneficiaries, and the question, the fundamental question it seems to us is, is that a Federal responsibility or is that cost to be fastened on the railroad industry? Restructuring of the Railroad Retirement System, HEARINGS ON H.R. 15301 BEFORE THE HOUSE ON INTERSTATE AND FOREIGN COMMERCE, 93d Cong., 2d Sess., 213-14 (1974).

* * * * *

Senator Hathaway. We could cut down the amount of the contribution, changing the cutoff. We could say 11 years instead of 10, as far as vesting is concerned.

Mr. Dempsey. Yes.

Senator Hathaway. Or in age in number of years.

Mr. Dempsey. Yes; you can do it both ways. I think the problem here is to find a standard that people in general will regard as fair. You will always have someone who is a little short of the line, and he will always feel that they did something different. Once you depart from what the law prescribes in terms of the qualifying years, of course, then you do have trouble. You can always say that as long as you stick to 10 years for railroad retirement, or however many years for social security, then say to that man, well, we are sorry, but this is really what the law did provide, and if we went any place other than what the law requires, then we would have an argument on where do we stop, or how far should we go. It seems to me the most logical approach that people will determine is fair is to stick to the vesting requirements of the two respective systems.

Senator Hathaway. Thank you very much, Mr. Dempsey. We have no further questions. Senate Hearings at p. 334.

53. The only hint of the plaintiff class' loss that the JLMC gave to Congress was contained in concededly inaccurate reports prepared by the management and labor sponsors which written reports were

inserted into the record and thereafter refuted by the oral testimony of the negotiators as aforementioned:

> Third, employees who have sufficient service and copensation [sic] to be fully qualified under both systems but who have not retired, prior to January 1, 1975, would be divided into two classes or groups. That division constitutes a refinement upon the recommendations of the Commission on Railroad Retirement which the Joint Negotiating Committee believed to be desirable in order to reflect more accurately the comparative equities of the two groups.
>
> The first group would be comprised of those employees with a "current connection" with the railroad industry—12 months of railroad service out of the previous 30 months, as defined in the 1937 Act and in the bill—either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service even though without such a "current connection." The Joint Negotiating Committee concluded that the service with and attachment to the railroad industry of such employees are sufficient to afford them an equity in windfall dual benefits substantially equivalent to the equity of existing beneficiaries. . . .
>
> The second group would be comprised of employees, who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years railroad service and who do not now have a current connection to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly,

> under the bill they would not receive a windfall dual benefit, upon retirement, unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid [upon death]). . . . HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 15301, 93d Cong., 2d Sess., at 168 (1974).

The above quotation euphemistically refers to the discrimination against the plaintiff class as a "refinement." Furthermore, the above quotation inaccurately defines the persons whose vested benefits were protected since it fails to disclose that persons who worked for the railroads for even one day in calendar year 1974 also received their full benefits.

54. The language in paragraph 53 above, shows that the plaintiff class and all other persons who had more than 10 and less than 25 years railroad service as of December 31, 1974, and who had sufficient service also to vest under Social Security as of December 31, 1974, and who had not yet retired as of December 31, 1974, were considered to be of one classification, thereafter divided into two groups solely for purposes of eliminating plaintiff Fritz' class from its earned benefits. This language also fails to show any justification for the discrimination.

55. All persons who, as of December 31, 1974, had 10 but less than 25 years railroad service, had sufficient service to vest under Social Security, and who were not yet retired, were one distinct class of persons

prior to the passage of the 1974 Act for retirement purposes.

56. The defendant in its briefs has argued that the plaintiff class was eliminated from their "vested" dual benefits because they are not "career" railroaders. Congress, however, considered a career railroader to be a person who spent his working life in the railroad industry i.e., one who spent 25 years in such industry. Congress did not distinguish between the plaintiff class and those persons similarly situated (10-25 years service) who continued to receive their dual benefit by reference to any so-called career test. Moreover, the Commission on Railroad Retirement referred to earlier herein made no such distinction either.

57. The "career" test advanced by the Railroad Retirement Board for the discrimination against the plaintiff class could not have been, and was not, the rationale behind the discrimination since: (a) the "career test" was never mentioned in Congress' review of the 1974 Railroad Retirement Act nor by any of the Acts' supporting private interest groups, instead, appearing for the first time in the Railroad Retirement Board briefs as an apparent post-hoc rationalization; (b) the authority cited by the Railroad Retirement Board referred to 1966 legislation dealing with supplemental annuities, not basic retirement benefits; (c) the "career test" discussed in 1966 is a wholly different concept and a different definition from that now advanced by the Railroad Retirement Board; (d) the Congressional history of the Railroad

Retirement Act of 1974 shows that, for the purposes of that Act, Congress considered a "career" railroader to be one who spent his entire working career with the railroad industry, not simply one who spent 10 years with fortuitous service in 1974; (e) the "career test" had never before been used to cause an exclusion of prior "vested" benefits, it had always been, rather, a benefit expanding concept; (f) the Commission on Railroad Retirement made no such distinction nor recommendation; and (g) the utilization of such a new "vesting" trait directly violated one of the Commission's principal specific recommendations.

58. The distinction between the plaintiff class and those persons similarly situated to the plaintiff class, who nevertheless are entitled to receive the dual earned benefit, is the "current connection" or "employment in 1974 qualification" mentioned above.

59. The current connection or employment in 1974 trait is not a proper standard for determining whether a railroader is a career employee. Being "currently employed" or being employed on any particular date in 1974 does not transform a former or present railroader into one whose life progression revolves around the railroad industry. Such criteria is especially incorrect and insidious for divesting persons of already earned dual benefits. Moreover, such criteria, prior to the 1974 Act, had never been employed as a trait for dual benefit vesting or for earning the basic Railroad Retirement annuity.

60. Indeed, as various affidavits demonstrate, there are members of the plaintiff class who have served a

greater number of years as an employee in the railroad industry than those persons similarly situated to the plaintiff class but who are entitled to receive their full dual earned benefits by virtue of the 1974 Act. Affidavits submitted in connection with the plaintiff's motion for summary judgment demonstrate that some members of the class had served as many as 14 more years in the railroad industry than those entitled to receive full dual benefits. In other words, some members of the class have served more than twice the time in the railroad industry than one receiving his or her full dual benefits under the 1974 Act. Thus many members of plaintiff's class are more "career" oriented for railroad purposes than are persons who are actually receiving full dual benefits under the Act.

61. After the legislative hearings, the Railroad Retirement Act of 1974 was passed on September 30, 1974, without change from the draft bill insofar as it affected plaintiff's class.

62. At no point in Congress' review of the Railroad Retirement Act of 1974 did railroad management or labor inform Congress that their bill violated one of the Commission on Railroad Retirement's principal recommendations by denying to the plaintiff class their already "vested" benefits.

63. At no time during the hearings did Congress even give a hint that it understood that the bill by its language eliminated an earned benefit of plaintiff's class. Contrariwise, one of the major announced purposes of both the United States Senate and the United States House of Representatives in passing the Rail-

road Retirement Act of 1974 was to protect the persons in plaintiff's class:

> Principal Purpose of The Bill
>
> The Bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis. . . .
>
> Persons in receipt of both Railroad Retirement and Social Security benefits as of December 31, 1974 will continue to receive benefits under both systems without any reduction in those benefits. Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law. S. Rep. No. 93-1163, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702. *Accord* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. (1974).

64. Congress considered all recipients of dual earned benefits equal, and intended to protect the "vested" benefits of all dual earned beneficiaries equally. To thwart any criticism of this approach and to make its position in this regard patently obvious, Congress concluded the following about all dual earned beneficiaries.

> Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved. H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

65. Congress intended only to prevent future vesting under both Railroad Retirement and Social Security, not to deprive any person of then-vested rights. Congress recognized only those not dually vested, as of December 31, 1974, as the only class of persons to be adversely affected by the 1974 Act.

> It must be recognized that the bill actually takes benefits away from certain railroad employees—those who have not already qualified for Social Security benefits. H.R. Rep. 93-1345, 93d Cong., 2d Sess. 6 (1974).

66. Since the passage of the Railroad Retirement Act of 1974, the railroad industry has made statements attempting justification for the distinction made between the plaintiff class and the other similarly situated and "vested" railroaders for purposes of receipt of full dual benefits. None of the statements provide a rational or justified basis for the distinction.

67. Moreover, no other evidence discloses any rational or justified distinction therefor. Nor does the evidence make any reference whatsoever to the so-called "career" railroader distinction argued by the defendant in its briefs in this cause of action.

F. *Injury To The Plaintiff Class.*

68. Plaintiff Fritz and the members of his certified class are fixed-income elderly people whose productive, income-earning years are now behind them. These fixed-income retirees cannot now relive their earnings years in order to reacquire their previously earned but now lost dual benefits.

69. The defendant estimates that the entire group of persons injured by the 1974 Act's classification discussed above, including the plaintiff's class, lost approximately $88 per month per person as a result of that classification. While the 1974 Act has not totally eliminated the class' Railroad Retirement benefits, the evidence discloses it has essentially done so to a number of the class members, substantially reducing such benefits, for example, from $110 to $7.24.

70. The class' reliance on the earned railroad retirement benefit and on the anticipated receipt of full dual benefits is clear from the evidence adduced herein. The affidavits of class members especially, show that not only had its members expected full benefits but also that the Board's field offices around the country had on various earlier dates informed class members both orally and in writing of the full amounts of Railroad Retirement benefits undiminished by any set-off or restriction that these members should anticipate receiving when the date of their actual retirement would occur.

71. Equally clear from the evidence is the fact that the class' reliance has been to the class' detriment. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. This point was confirmed in the JLMC negotiations shortly prior to the sending of its report to Congress in April, 1974:

> Mr. Dempsey: . . . The benefit [dual benefit] is one that if we were starting out we would

> not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. But we cannot do that—we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood. *Burner Deposition Exhibit I* (March 18, 1974, JLMC Meeting) (bracketed material added).

72. The evidence further shows that the class is comprised of former railroaders who were not "currently connected" with the railroad industry nor employed therein in 1974. The evidence shows that many, however, left the railroad industry because they were forced to do so, not because they were seeking other employment after earning their Railroad Retirement benefit. Thus many members of the class were involuntarily deprived of the opportunity to either a "current connection" or 1974 employment. This fact further contributes to the impropriety of eliminating railroaders of their earned dual benefits on the basis of such criteria. 123 Cong. Rec. S. 1448 (daily ed., Jan. 26, 1977).

II. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact the plaintiff is entitled to judgment as a matter of law and the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of this cause of action under 28 U.S.C. §§ 1331(a) and 1337, and has heretofore properly certified this cause of action as a class action in accordance with the requirements of

law and the Federal Rules of Civil Procedure. Plaintiff Gerhard H. Fritz is the duly certified plaintiff representative of the class.

2. Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231b(h), creates a classification as to persons covered by the Railroad Retirement system between (a) those persons who have less than 25 but more than 10 years railroad service as of December 31, 1974, who were "vested" under Social Security and Railroad Retirement as of September 31, 1974, and who had a "current connection" as defined in 45 U.S.C. § 231(o) with the railroad industry as of December 31, 1974, or who had worked for the railroad industry in 1974 ("Other Vested Railroaders"); and (b) those persons who have less than 25 but more than 10 years of railroad service as of December 31, 1974, who were "vested" under Social Security and Railroad Retirement as of December 31, 1974, but who had no current connection as defined in 45 U.S.C. § 231(o) or who did not work for the railroad industry in 1974 ("Plaintiff Class").

3. The plaintiff class consists of those persons described in Conclusion 2(b) above who were retired as of January 31, 1977.

4. The distinction between the Plaintiff Class and all Other Vested Railroaders is based solely upon whether the railroad retirement beneficiary was "active" with the railroads as of December 31, 1974, either by having a current connection as of that date with the railroad industry or having been employed in the railroad industry at any time in calendar year

1974. In all other respects the two classes are indistinguishable.

5. The Plaintiff Class' claim does not involve the deprivation of a fundamental right or the discrimination against a suspect class. The discrimination against the Plaintiff Class must therefore be arbitrary, capricious and irrational before such discrimination can be held unconstitutional (the "rational basis test").

6. Arbitrary, capricious and irrational discrimination against a class of persons is prohibited by the equal protection component to the due process clause of the Fifth Amendment to the United States Constitution.

7. While the standard of review in this case is the rational basis test, that standard is not meaningless and requires that the discrimination at issue have some rational relationship to the purposes of the statute which created it.

8. The rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created by the defendant after-the-fact.

9. The purposes of the Railroad Retirement Act of 1974 were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons entitled before December 31, 1974, to receive their full benefits under both Social Security and Railroad Retirement earned and "vested" under the previous law.

10. Congress did not create the classification between the Plaintiff Class and all Other Vested Railroaders for the purpose now suggested by the defendant of favoring "career" railroad employees over other railroad employees.

11. Assuming that Railroad Retirement benefits are as the Supreme Court has held, non-contractual, those benefits, if retained, must be distributed and made available to the beneficiaries in a non-discriminatory manner.

12. The savings provided the Railroad Retirement Fund by imposing a reduction of benefits solely upon the Plaintiff Class is not sufficient, of itself, to justify an otherwise arbitrary, capricious and irrational classification.

13. The actuarial deficiency of the Railroad Retirement Fund cannot be resolved, in conformity with the rational basis requirement of the Fifth Amendment, by merely excluding inactive railroaders from their entitlement to full railroad retirement benefits, especially when such railroaders over the course of their railroad years, contributed to and earned their entitlement to the benefits in strict accordance with the law then in effect.

14. Other methods of resolving the financial difficulties of the Railroad Retirement Fund were available which did not impose upon any single class the complete burden of rendering the Railroad Retirement Fund actuarially sound.

15. The reasonable reliance of the Plaintiff Class and their expectations to a full Railroad Retirement

benefit after a minimum of 10 years credited Railroad Retirement service, heightens the arbitrariness, capriciousness and irrationality of the Railroad Retirement Act of 1974's divestment of the Plaintiff Class' entitlement to a full Railroad Retirement benefit.

16. The arbitrariness, capriciousness and irrationality of the Act is also heightened by the railroad labor union's agreement during the critical negotiations to deprive the plaintiff class of their "vested benefits" in exchange for liberalized benefits for others thus breaching the railroad labor union's duty of fair representation owed plaintiff's class which breach was sanctioned by Congress in its enactment of the 1974 Railroad Retirement Act.

17. Congress' unawareness of the adverse effects a statute imposes on a class, and any conclusion of Congress as expressed in legislative history, that a statute harms no one when, in fact, a class is harmed, are also factors bearing adversely on the rationality of a statutory discrimination between similarly situated persons.

18. Congress was unaware that the Railroad Retirement Act of 1974 adversely affected the Plaintiff Class, and, indeed, Congress' purpose was to protect fully the Plaintiff Class' full retirement benefits.

19. The classification created by the Railroad Retirement Act of 1974 as defined in Conclusion 2 above is not rationally related to either the purpose of making the Railroad Retirement Fund actuarially sound or the purpose of protecting completely those persons who were entitled to receive both Social Security and Railroad Retirement Act benefits under previous law.

20. The classification as defined in Conclusion 2 above is unconstitutional under the equal protection component of the due process clause of the Fifth Amendment of the United States Constitution. Such classification is arbitrary, capricious and irrational and denies Plaintiff Class equal protection under the law.

21. Because the Supreme Court of the United States has previously ruled on the question, this Court holds that the Plaintiff Class' Railroad Retirement benefits are not vested property rights under the Fifth Amendment to the United States Constitution.

22. All persons injured by the classification described in Conclusion 2(b) above, are entitled to have those retirement benefits they would have received had they qualified for the "windfall" component of 45 U.S.C. § 231b(h) in the same manner and to the same extent as if they were Other Vested Railroaders as same are described in Conclusion 2(a) above.

23. All persons injured by the classification described in Conclusion 2 above are entitled to have the windfall component as of and from the date of their retirement.

24. Finally, the Court notes that the general class of former railroaders injured by the Railroad Retirement Act of 1974 identified in the Amended Complaint is as yet uncertified as to class status. The present Amended Complaint alleges plaintiffs L. Jackson Lipp and William D. Gibson as representative plaintiffs of this general class. The distinction be-

tween the certified class and the general class viz., the larger group of potential class members identified in the Amended Complaint, is based solely upon whether a general class member retired on or before January 31, 1977, and thus was sustaining an actual injury as of the date of class certification. In all other relevant respects, the certified class and the general class appear the same.

25. The findings and conclusions set forth above are deemed to thus apply equally to the yet uncertified general class members who retired on or after February 1, 1977. The Court is hopeful that the parties can agree as to the appropriate disposition of the general class' claims without requiring further certification proceedings or the substantial time of this Court.

To the extent any finding of fact shall have been denominated a conclusion of law hereinabove, it shall be deemed a finding of fact; to the extent any conclusion of law shall have been denominated a finding of fact hereinabove, it shall be deemed a conclusion of law.

/s/ Cale J. Holder
HONORABLE CALE J. HOLDER,
Judge,
United States District Court,
Southern District of Indiana

Dated: 27 July 1979

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

JUDGMENT

The Court having made its Findings of Fact and Conclusions of Law herein and there being no genuine issue as to any material fact and plaintiff being entitled to judgment as a matter of law under the provisions of the Federal Rules of Civil Procedure, Rule 56(e), upon the issues of the Cross-Motions for Summary Judgment, it is hereby ORDERED, ADJUDGED AND DECREED that:

(a) Plaintiff Gerhard H. Fritz' Motion for Summary Judgment filed on behalf of himself and all other members of his certified class, is GRANTED, and defendant United States Railroad Retirement Board's Motion for Summary Judgment is DENIED;

(b) The defendant shall henceforth compute and pay benefits for said plaintiff and all mem-

bers of his certified class who were entitled, as of December 31, 1974, to receive Social Security benefits upon retirement, and who had more than ten but less than twenty-five years credited railroad service, and who were not yet retired, as of December 31, 1974, as though those persons had a current connection with the railroad industry, as defined in 45 U.S.C. § 231(o), on December 31, 1974, or served as an employee to a railroad employer or an employee representative during calendar year 1974;

(c) The defendant shall pay to said plaintiff and all members of his class who were entitled to receive, as of December 31, 1974, Social Security benefits upon retirement, and who had more than ten but less than twenty-five years of credited railroad service, and who were not yet retired as of December 31, 1974, but who had retired since December 31, 1974, those retirement benefits such persons would have received had they had a current connection with the railroad industry as of December 31, 1974, or served as an employee to a railroad employer or as an employee representative during calendar year 1974;

(d) The defendant shall provide this Court and counsel for the said plaintiff, within sixty days from the date of entry of this Judgment, with a plan for the payment of this Judgment to the persons benefited, including in such plan a calculation of the amount to be paid and an appropriate schedule for the making of such payments;

(e) Also within the time period set forth in (d) above, the Court will entertain receipt of a

plan from the defendant for the payment of benefits to the yet uncertified members of the general class upon the same basis as found and concluded in relation to the certified class. If such plan is not then forthcoming, the plaintiffs are instructed to thereafter proceed with proceedings in this cause of action so as to certify and litigate to an appropriate conclusion, the claims of the members of the alleged general class;

(f) The costs of this action are assessed against the defendants; and

(g) The plaintiff's counsel shall have its reasonable attorneys' fees and expenses paid out of the fund thereby created for the persons benefited. The amount of such fees and expenses will be determined by this Court upon appropriate petition and hearing therefor.

/s/ Cale J. Holder
HONORABLE CALE J. HOLDER, Judge,
United States District Court,
Southern District of Indiana

DATE: 27 July 1979

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 76-419-C

GERHARD H. FRITZ, On Behalf of Himself and All Others Similarly Situated, PLAINTIFF

v.

UNITED STATES RAILROAD RETIREMENT BOARD (An Agency of the United States of America), DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to Title 28, United States Code, Section 1252, from the judgment of the District Court entered in this action on July 27, 1979.

Dated at Indianapolis, Indiana, this 22nd day of August, 1979.

JAMES L. COWEN
Chairman, United States Railroad Retirement Board (an agency of the United States of America) Defendant

/s/ Virginia Dill McCarty
VIRGINIA DILL MCCARTY
United States Attorney

By: /s/ Charles Goodloe, Jr.
CHARLES GOODLOE, JR.
Assistant United States Attorney

274 United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204

APPENDIX D

Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), provides, in pertinent part:

> (1) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the

provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

(2) The amount of the annuity provided under subsections (a) through (d) of this section to an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (1) of this subsection, but (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which he last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions

of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which he last performed service as an employee under this Act, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which he last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

(3) The amount of the annuity provided under subsections (a) through (d) of this sec-

tion of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such

service as an employee had been included in the term "employment" as defined in that Act.

(4) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (3) of this subsection, but (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act of (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from em-

ployment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

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A MOTION TO DISPENSE WITH THE PRINTING OF THE APPENDIX WAS MADE AND GRANTED

Supreme Court, U. S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-870

In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

v.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

v.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana

MOTION TO AFFIRM

Appellee moves the Court to affirm the appeal herein on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to warrant further argument.

JURISDICTION

Appellee agrees with appellant that the Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1252.

QUESTION PRESENTED

Appellant has misstated the question of this appeal. Appellee has not challenged section 3(h) of the Railroad Retirement Act of 1974 on the grounds that it discriminates on the basis of length of service. The question presented is, instead, correctly stated as follows: Whether section 3(h) (1) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h) (1), violates the equal protection component of the Due Process Clause of the Fifth Amendment because it irrationally distinguishes between classes of similarly situated vested annuitants by depriving the members of one class of "dual benefits" solely because they were not currently affiliated with the railroad industry in 1974.[1]

STATUTE INVOLVED

Only section 3(h) (1) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h) (1), is at issue in this appeal. It is set out in the Appendix to the Jurisdictional Statement, at 38a-39a.

---

[1] A "current affiliation" as used by both the appellant, Jurisdictional Statement at 2, and the appellee, means having a "current connection" with the railroad industry as of December 31, 1974 (twelve month service out of the preceding thirty months, 45 U.S.C. §231(o)), or having worked for the railroad industry for even just one day in calendar 1974.

STATEMENT OF THE CASE

Appellant's Statement of the Case set forth at 2-15 in its Jurisdictional Statement is incomplete. A further development of the facts is necessary for a fair understanding of the question presented.

This case is a result of changes in the railroad retirement system effected by the Railroad Retirement Act of 1974. Prior to its implementation, employees who had worked sufficiently in railroad and non-railroad industries were entitled to benefits under both Railroad Retirement and Social Security. Their total benefits under the two programs were larger than the amounts they would have received had they worked in employment covered under only one plan or the other.

The 1974 Act sought to gradually eliminate these additional payments, known as dual benefits. This phaseout permitted those who were retired and receiving benefits by the effective date of the Act (January 1, 1975) to continue their eligibility. Conversely, those still working but not permanently insured under Social Security by the effective date were denied future entitlement to dual benefits. The remainder were divided into two groups. Those with twenty-five years of railroad service had their rights to dual benefits protected. The other group, with at least ten years of railroad credit and thus permanently insured for railroad retirement coverage as well, were then subdivided into two groups. Those who were then currently affiliated with the railroad industry i.e., those who had a "current connection" or who worked for the railroad industry for even just one day during 1974, had their vested rights protected. The others with the same

years of railroad credit lost their vested rights to dual benefits. This divested sub-group comprises appellee's class.

This elimination of dual benefits was not the first instance in which that action occurred. The 1951 amendments to the Railroad Retirement Act of 1937 (Pub.L. No. 82-234) similarly affected some railroaders. To the extent that Social Security and Railroad Retirement benefits were the result of credit given by both programs for pre-1937 service (before Social Security and Railroad Retirement existed), an offset was imposed, in effect eliminating dual benefits.[2] Because Congress later determined that the 1951 action was inequitable, and "discriminated against a special group of retired employees," it repealed the off-set in 1954, retroactive to 1951, thereby restoring dual benefits to all those previously eligible. Pub.L. No. 83-398 (1954). H.Doc.No. 758, 83d Cong., 1st Sess., 6-9 (1953). Representative Wolverton, who sponsored the repeal, indicated that Congress had not been sufficiently informed of the effect of its earlier action:

> "I believe that the term 'dual benefit provision' was chosen deliberately and for the purpose of misinforming all persons who have occasion to study this provision. I believe that this terminology was responsible, at least in part, for the adoption of this legislation by the 82nd Congress. This terminology is misleading and designed to hide the fact that the provision which this legislation would repeal has wiped out or curtailed certain retirement benefits which railroad employees had every reason to believe were inviolate." 99 Cong.Rec. A4508 (daily ed., July 17, 1953).

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[2] These benefits had been based based on credits for which no contributions had been paid, in contrast to the dual benefits effected by the 1974 Act.

The effort which culminated in the 1974 Act had its genesis in the creation by Congress of the Commission on Railroad Retirement. The Commission was explicitly organized as an impartial tribunal, its five members consisting of one railroad management representative, one railroad union representative, and three public representatives. Pub.L. No. 91-377, at §7(a)(1). The President appointed three, the Speaker of the House one, and the President Pro Tem of the Senate the last.

Of the Commission's four major recommendations, one is directly applicable to the issue of this case:

> "2. *Legally vested rights of railroad workers and railroad retirement beneficiaries to benefits based on social-security-covered non-railroad service should be guaranteed, but future accrual of these dual benefits should be stopped.*" Report of the Commission on Railroad Retirement, H.Doc.No. 92-350, 92d Cong., 2d Sess., at 4 (1972) (emphasis in original). *See also id.*, at 368.

In the extensive elaborations upon this recommendation in the body of the Commission Report, the Commission repeatedly emphasized that dual benefits should be phased out, but with entitlement thereto protected for retirees already receiving them and for those like appellee's class whose rights had already vested. This final determination by the Commission was thus the protection of all vested rights, regardless of other indices of employment. *E.g.*, Commission Report, *supra,* at 21, 156, 344, 369.

After submission of the Commission Report to Congress the next significant step was the creation of the Joint Labor-Management Negotiating Committee ("JLMNC" or "Committee"). Its members were directed to negotiate and prepare a bill to restructure the railroad retirement system to make it actuarially sound. Pub.L. No. 93-69,

§108 (1973). They were not told to increase any existing benefits, and they were explicitly directed to "take into account the specific recommendations of the Commission on Railroad Retirement." *Id.*, at §107(c)(1). Unlike its predecessor, the Committee was not a neutral organization; labor and management were permitted to make their own appointments without review or consent of Congress, *id.*, at §107(a), and there was no representative of the public or of retired railroaders on the Committee.

In essence, it was the bill prepared by this Committee that became the 1974 Act; its only significant departures from the recommendations of the Commission were: (i) the divestiture of the appellee class and (ii) an increase in benefits to certain present recipients which was possible only because of that divestiture. The actuarial deficiencies of the railroad fund, which had initially aroused congressional concern, were resolved by actions other than that taken against the appellee class.

The appellee and his class[3] in this action are those who

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[3] The certified class included only those former railroaders who were injured by the discrimination engendered by subsection (h)(1) and who wrere retired *as of January 1, 1977*. In arriving at its decision, the district court recognized that its holding as to this certified subclass of former railroaders (about 5000) would also apply to the larger, uncertified general class (about 86,000) of former railroaders injured by subsection (h)(1) who bear the same characteristics as the certified subclass but who would retire *after January 1, 1977* (Appellant's Appendix A, at 31a-32a). Since both the appellee and the appellant (Appellant's Jurisdictional Statement, at 12-13 n.7) recognize that the Court's decision as to the certified class equally impacts upon the general class, the appellee for purposes of this discussion is not distinguishing between the certified subclass and the uncertified general class.

were completely divested by the 1974 Act. Appellant implies that the main effect of that Act was merely to reduce the dual benefits of some recipients (see Jur. St., at 9-10 § n.5), but this case is concerned with the estimated 86,000 former railroaders who have been or will be denied all of the dual benefits in which they were vested prior to the effective date of the Act. It is the effect of subsection (h)(1) which is at issue in this appeal. It is true, as appellant notes, that the fate of (h)(2) must follow that of (h)(1) (Jur.St., at 12-13 n.7). But the issue of this appeal is the propriety of the decision to repudiate the vested rights of a portion of retired railroaders for the sole reason that they were not currently affiliated with the railroad industry in 1974. It is they who have borne the full brunt of the Committee's actions.

THE DENIAL OF DUAL BENEFITS TO SOME VESTED BENEFICIARIES REPRESENTS INVIDIOUS DISCRIMINATION FOR WHICH THERE IS NO RATIONAL BASIS

It is indisputable that Congress could have conclusively eliminated dual benefits for everyone. See Jur.St., at 16. But Congress chose instead, as recommended by the Commission, to phase out dual benefits. It is the *nature* of that decision which is the subject of this appeal, for "the manner in which [a legislature] dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe*, 432 U.S. 464, 470 (1977). Specifically, the decision to favor one class over another must be a reasonable one. "A general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

Appellant attempts repeatedly to support the distinction between classes in this situation as a typical and permissible legislative effort to draw lines on the basis of duration of railroad service. See Jur.St., at 16, 18. This case, however, is not a challenge to a limitation designed to define those who meet the threshold service requirements for eligibility; those requirements, by definition, have been previously established and met by both the favored and disfavored classifications. Thus, all members of the two classes have compiled more than ten but less than twenty-five years of service in the railroad industry, and were permanently insured under the Social Security Act by December 31, 1974. *See* 45 U.S.C. §231(r). In those respects, they have all met the standards established for "vested" status.

The only distinction between the protected and unprotected classes essentially amounts to the timing of their railroad services—*not* the duration of their railroad service.[4] And this timing requirement was imposed *after* appellee's class had already achieved vesting and entitlement to the dual benefits in strict accordance with the law as it then existed. The two alternative additional require-

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[4] A separate classification are those former railroaders with more than 25 years of railroad service. Appellee did not contest this favored classification because the setting of arbitrary periods of service as eligibility requirements does not implicate the equal protection clause. It is reasonable to classify railroaders with more than 25 years as "career" railroaders who are in a different position than those with 10-25 years of services. Similarly, appellee has no dispute with the determination to deny dual benefits to those with less than ten years of service, as the ten-year mark has historically and reasonably divided vested and non-vested railroaders.

ments in subsection (h)(1), that the railroader have a current connection or that he have worked in the railroad industry for at least one day in 1974, do not define the protected classification by reference to the extent of their credited service, but only with respect to the timing of their service in the railroad industry. Thus, far from awarding those with longer periods of railroad service with a continued right to dual benefits, the classificatory scheme capriciously ignores the duration of railroad service in favor of its timing.

As a result, for instance, a man such as class member William Kirby, who was forced to leave the railroad industry with over 22 years of credited service, is divested of his right to dual benefits because he finished his work-life in Social Security—covered employment, while an individual with only eleven years of railroad service, who came into that industry at the end of his career (or who returned to it briefly, perhaps for only a few days in 1974), has his vested rights recognized. It cannot be emphasized sufficiently that this is not merely the occasional inequitable result of the classificatory scheme; it is the rule. By definition, the individuals in both classes worked for the same number of years in the railroad industry and were permanently insured in Social Security. As a result, there will be as many former railroaders in the divested class with nearly twenty-five years of credit as in the protected class.

The patent irrationality of the discrimination against the appellee class is further exemplified by that discrimination's violation of one of Congress's basic purposes for

the 1974 Act—the preservation of the dual earned benefit for *all* "vested" railroaders.

> "Persons who already have vested rights under both the Railroad Retirement and Social Security Systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law." S. Rep. No. 93-1163, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702. *See also,* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2 (1974).

The discrimination against the appellee class thus was not only not related to the objectives of the 1974 Act, that discrimination was, in fact, contrary to the objectives.

The other purpose of the 1974 Act was to resolve the perceived actuarial dilemma of the railroad retirement system. Commission Report, at 3. Consequently, the Commission looked to the causes of the fund's precarious financial position, and isolated the payment of dual benefits as a significant factor.[5] From that point the Commission then resolved to phase out dual benefits, rather than to eliminate them entirely, on the grounds that vested entitlement should be recognized:

> "There is considerable validity in this point insofar as it applied to rights which have been earned on the basis of *past* service under the statutes which governed that service. If rights to dual benefits are already *vested,* i.e., if employees are already *permanently* or *fully* insured under social security, caution must be exercised with respect to modifying these benefits, and the Commission has endeavored in its recommendations to provide fair treatment on this

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[5] It was estimated that 38% of all railroaders were receiving dual benefits in 1971. Commission Report, at 22.

> score. However, the argument cannot validly be extended to forestall the Government from rationalizing the present inequitable and over-costly statutory benefit structure to keep it from yielding windfall benefits based on future service." Commission Report, at 352 (emphasis in original). *See also* S.Rep.No. 93-1162, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News, at 5710.

Throughout the Report, therefore, the Commission emphasized that vested status should be the determinative factor for future receipt of dual benefits. So that there would be no doubt as to its intention, the Commission defined "legally vested", "vested benefit", and "vesting". *See* Commission Report, at 552, 555. The effect of this conclusion was protection of the rights of those who had met the minimum length of service requirements: ten years in the railroad industry, and permanently vested in Social Security.[6]

That the scheme ultimately selected does not rationally further the goals of the Act is evident from an evaluation of both the manner in which that scheme was devised and the scheme itself. The best that can be said about the requirements which divested the plaintiff class is that they were not fully explained or understood; the worst interpretation of their exclusion is that the Committee, led by its labor members, set out explicitly to to increase the benefits of certain beneficiaries by divesting the appellee class of their vested rights, and accomplished this by misleading and confusing Congress as to the nature of the changes. Regardless of which depiction is more accurate, the simple fact is that the "sacrifice" of

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[6] Generally, that is also a ten-year requirement, but it can be less. See 42 U.S.C. §414(a).

the appellee class was unnecessary for protecting the actuarial soundness of the fund and was accomplished without Congress recognizing that some vested beneficiaries would lose their rights under the 1974 Act.[7]

The Joint Labor-Management Negotiating Committee initially recognized the propriety of all of the Commission's recommendations. Indeed, all major recommendations were implemented, except for that one which preserved benefits for all vested beneficiaries. The appellee class lost its vested entitlement for reasons unrelated to the actuarial problems of the fund which had caused the initial congressional concern. The 9 per cent deficiency which was at the root of that concern was resolved by restructuring the benefit formula and receipt of funds from the Treasury. Burner Deposition, Exhibit J. Committee letter of April 10, 1974 to Sen. Harrison Williams, at 9. But an additional 3 per cent deficiency had been created by the demands of the Committee's labor-appointed representatives that increases be provided for three groups of present beneficiaries. *Id.*, at 6. *See also* S.Rep.No. 93-1163, *supra,* at 5705. These increases led directly to the determination to divest the appellee class of their dual benefits:

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[7] Indeed, no explanation of or reference to the favored class whose entitlement was guaranteed because they worked in the railroad industry in 1974 appears in the discussions of this provision. The Committee did not even refer to it in its letter to Senator Williams of April 10, 1974 setting out the essence of its determinations. Burner Deposition, Exhibit J. Whether this was a mere oversight, or an additional effort at obfuscating its purposes, is unknown. It remains, however, that the "work-in-1974" rule bears even less relation to the purported goals of the Act than does the so-called "current connection" rule.

> "[T]hese reductions in future payments are offset in part by three liberalizations in benefits designed to make fully effective the early retirement provision which was enacted last year. The three liberalizations which the bill would provide have a level cost of 3.1 per cent of taxable payroll. . . ." S.Rep.No. 93-1163, at 5705.

And:

> Mr. Dennis [Chief Labor Negotiator of the Committee, after elimination of the appellee class from vested status at a JLMNC meeting]: ". . . keep the current law in effect with certain changes which come to about 3 per cent, but savings to the plan come to a lot more on the deficit picture. The dual benefits and other things would save a lot more than the new benefits would cost." Burner Deposition, Exhibit I (March 18, 1974, JLMNC meeting).[8]

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[8] A virtually identical effort was made with the 1951 amendments. In that instance, the elimination of dual benefits for some railroaders also allowed the increase of benefits to others. In urging its repeal, Representative Wolverton made these observations, which are equally applicable in the present context: "It has been claimed, and with some justice, that this detrimental treatment of some to the advantage of others creates a real violation of constitutional principles. . . . The unfairness of this provision is so manifest that those who oppose its repeal have been forced to advance innumerable sophistries in an effort to make a shadow of a case in favor of its retention. The only real reason . . . , however, for the continued retention of this provision is that it is expected to save the fund an amount sufficient to pay higher benefits to others . . . . [But] the financial soundness of the fund is not jeopardized by the repeal of this provision. Nor, at this time, can any valid argument be made that the condition of the fund requires the retention of this manifestly unfair and discriminatory provision." 99 Cong. Rec. A4508-A4509 (daily ed., July 17, 1953).

The rationale for this sell-out of the appellee's class was also provided by Mr. Dennis: "I think we are close on duals, although there is still a way to go. I personally care less about those who are not vested and those who left the railroads . . . ." Burner Deposition, Exhibit I (March 20, 1974, JLMNC conference). In short, those who had vested and then had left the railroad industry (appellee's class) were wrongly considered equivalent to those who had not established a vested right.

On April 10, 1974, the Committee simultaneously presented their proposed bill to its sponsors, Senator Williams and Representative Staggers, and issued a press release. The latter cynically and incorrectly implied that the Committee had followed the Commission recommendations:

> "A principal recommendation of the joint rail-union group relates to dual benefits. The Commission on Railroad Retirement recommended that these benefits be phased out gradually in order to protect existing employees and beneficiaries. The joint rail-union group agreed in general with this recommendation." Duensing Deposition, Exhibit Q.

This "agreement in general" is equivalent to what the appellant now terms a "refinement" of the Commission's recommendation: the divesting of an estimated 86,000 vested former railroaders.

The deception, or confusion, continued during congressional hearings. Representative Dingell sensed "a sleight of hand" and that "somebody has to get it in the neck on this." But he was informed instead by the Negotiating Committee that "this is a situation in which everybody wins." Hearings on H.R. 15301, 93d Cong., 2d Sess., 199, 201 (1974). Indeed, in either the confusion of the

moment or in a concerted effort to avoid the logical conclusion of Dingell's questioning, William Dempsey, Chairman of the National Railroad Labor Conference and Chief Management Negotiator of the bill, stated:

> "This part on the top is the cost of the gradual phaseout of dual benefits, that is, the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected." Hearings on H.R. 15301, 93d Cong., 2d Sess., 213-214 (1974) (emphasis supplied).

Passage of the bill in the fall of 1974 still did not bring the issue into the open. A press release distributed by the Railroad Retirement Board evidenced either a misperception by the Board as to the effect of the Act—or an intentional effort to deceive:

> "One of the most important changes in the railroad retirement system effects the gradual phase-out of dual benefits . . . . However, employees who retired before the changeover date of January 1, 1975 will still continue to receive at least the same amounts of railroad retirement and social security benefits they were receiving before changeover. Also, employees retired after changeover who were fully vested for both railroad retirement and social security benefits before the changeover will receive an additional amount in the tier II portion of their annuity, generally referred to as a 'windfall' amount." Document 23 to Defendant's Response to Plaintiff's Request for Admissions, filed Feb. 9, 1979.

Only when former railroaders began retiring in 1975 did they discover that their vested status had been ignored. At that point, with complaints increasing, Congress began to consider its actions. Senator Domenici, in proposing S.467, which would have repealed the dual benefit denial, stated:

> "The interests and concerns [of those adversely affected] were simply not taken into account in our haste to pass the 1974 amendments . . . . Their side of the question was never really considered or represented . . . . We, in Congress, cannot change laws adversely affecting thousands of Americans, and expect their continued faith and support in government. Surely changes in laws are necessary, but we should also be mindful of those overlooked in the process." 123 Cong. Rec. S1448 (daily ed., January 26, 1977).

A newspaper article published on July 25, 1976 apparently both stirred Congress' interest and placed the Board and former Committee members on the defensive. The article, which quoted numerous individuals involved in the drafting and passage of the 1974 Act, explicitly stated that the labor negotiators had determined that former railroaders could be sacrificed because they were no longer union members. Washington Post, July 25, 1976. The effect of his article was soon evident; in a Senate Subcommittee on Labor hearing convened to consider Senator Williams' proposed technical amendments to the 1974 Act, conversation centered principally on the *Post* article and on the vested rights which had been eliminated. William Dempsey devoted most of his testimony to the issues raised by the *Post* article. Instead of directly facing the issue, he relied on the old stand-by

that all dual benefits are inequitable,[9] and stated that they were partially eliminated by the 1974 Act: "The touchstone finally agreed upon and reflected in the legislation had to do with vesting." Hearing before Subcommittee on Labor on S. 3662, 94th Cong., 2d Sess., at 49 (Sept. 8, 1976). And, still failing to explain clearly that some vested beneficiaries were protected while others were not, he continued to obfuscate the issue by suggesting that those who did not receive dual benefits are "treated the same as anybody else in American society: He gets the social security benefit and he gets his railroad retirement benefit." *Id.*, at 49.

The pattern of confusion or deception thus has continued during the conception, birth, and short life of the 1974 Act. This pattern precluded both Congress and the affected former railroaders from attempting to correct the discrepancies. It allowed the bill's drafters to ignore the recommendations supporting vested rights, and to use the confusion surrounding the system's actuarial position actually to increase benefits for some beneficiaries as a result of the divestiture of the appellee class. This history alone suggests irrational legislation.

The unfair and invidious result of this legislation, however, is also readily apparent from an evaluation of the offending provision itself. This is not a situation in which Congress has selected the least palatable of several possi-

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[9] This argument of inequity or unworthiness of entitlement to benefits flies directly in the face of what Congress emphatically stated in its written report on the 1974 Act. Congress there decreed that "Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

ble alternatives, which is a permissible, if not preferable, exercise of its Constitutional function. *See e.g., Califano* v. *Aznavorian,* 439 U.S. 170 (1978). By contrast, in this instance, Congress, whether intentionally or otherwise, has discriminated against a distinct class of former railroaders whose duration of service in the industries for which they are insured is identical to that of their counterparts who are protected. The members of this class do not, like those in *Aznavorian,* just happen to fall on the wrong side of an arbitrary, but necessary eligibility condition; rather they were selected, as a class, for disaparate treatment, despite having the identical nexus of eligibility to the benefit programs as do the members of the protected class. This adverse treatment of a select class of individuals, apparently because of their political unpopularity and powerlessness among those undertaking the selection (rail union and rail management), represents the classic instance of a denial of equal protection. *See United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973).

Even if it were demonstrable that further reduction in beneficiaries or benefits was necessary to protect the actuarial soundness of the fund, no legitimate rationale exists for this discrimination. As has been repeatedly noted, the savings of resources alone is not a sufficient rationale for invidious discrimination. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 263 (1974); *Silbowitz* v. *Secretary of HEW,* 397 F.Supp. 862, 867 (S.D.Fla. 1975), *aff'd,* 430 U.S. 924 (1977); *Medora* v. *Colautti,* 602 F.2d 1149, 1153 n.9 (3d Cir. 1979). And this classification, on its face, is invidious. No precedent exists in the Railroad Retirement or Social Security systems for differential treatment based on the timing of covered em-

ployment. However inequitable dual benefits may or may not be, the decision to maintain them requires equal treatment of those similarly situated. Thus, there exists no valid reason why those who worked in the railroad industry for one day in 1974 (or for twelve months in the thirty months prior to January 1, 1975) should be fully protected while others with equal service time are not. The members of both groups had equally contributed to both Social Security and Railroad Retirement, and both had met the long-standing required conditions for eligibility in the two programs before the effective date.

Nor does this rationale become more persuasive on the theory that the "inactives" (i.e., those who did not meet the current connection or work-in-1974 tests) had "deserted" the railroad industry. The available evidence suggests that most of the appellee's class left because the declining railroad industry forced them out. Senator Domenici noted this factor: ["F]rom existing records and accounts, the majority of these former employees had no choice of staying with the railroads . . . . I believe [this] to be [an] important consideration today as we attempt to correct this justice." 123 Cong.Rec. S1448, *supra.* See also Affidavits of William Kirby and Horace Lindsey, filed Feb. 27, 1979. It was not disloyalty to the railroads which motivated the Committee's determination to sacrifice these individuals, but rather the Committee's members' lack of interest in or formal responsibility to former railroaders who were no longer union members. As Dennis expressed it: "I personally care less about . . . those who left the railroads . . . ." Burner Deposition, Exhibit I (March 20, 1974, JLMNC conference). Of course,

it is readily apparent that one day's service in 1974, for example, does not and should not determine "loyalty".

Moreover, loyalty to one industry or another even if it were otherwise properly ascertainable, cannot be the determinative factor in eliminating a benefit which derives from the integrated relationship between Social Security and Railroad Retirement. Since the relationship between Social Security and Railroad Retirement was an aspect of the overall problem of the railroad system, railroaders had the task of revising that relationship. That may explain their decision to rationalize the disparate treatment on the so-called grounds of "loyalty" to the railroad industry, but it does not rationally support favoring "loyalty" to one industry over another. Members of the two classifications had served in botn types of employment, had contributed to both programs, and derived their benefits from both. Consequently, even if loyalty could be rationally evaluated in the manner sanctioned by the Committee, and it is not, there is no logic in recognizing one type of employment as more important than the other.

The perceived inequity of providing any dual benefits, a perception criticized b yCongress as earlier noted, is irrelevant to the issue of this case. Once the determination was made that dual benefits were not be conclusively eliminated, Congress was required to provide similar treatment to all vested employees. The appellee class, therefore, must have its members' rights protected to the same extent as do those in the favored class.

CONCLUSION

The railroad retirement system is one of extreme complexity. In revising it through the 1974 Act, Congress did not simplify that system.[10] It therefore may seem incongrouous that plaintiff is here requesting the Court to affirm the district court's action without benefit of full briefing and oral argument. But this case, reduced to its relevant bottom line, involves a relatively simple issue: the disparate treatment of one class of vested beneficiaries for reasons unrelated to the work contribution which serves as the nexus of entitlement for Social Security and Railroad Retirement benefits.

The legislative history demonstrates conclusively that the primary purpose in restructurin the Act was to eliminate the railroad system's perceived financial weakness. A significant element of that effort was recognition of the distinction between vested and non-vested beneficiaries. Yet that distinction was not applied to the appellee class. The legislative history also establishes that the protection of the fund's financial soundness was not a factor in the decision to deny dual benefits to the appel-

[10] The Railroad Retirement Board's 1976 Annual Report made this observation: "A former Chief Actuary of the Board once commented that the railroad retirement system is so complex that it virtually defies verbal description. The new law, which became effective January 1, 1975, increased the complexity." 1976 Annual Report, at 57. Indeed, President Ford vetoed the 1974 Act in part because it failed to provide a comprehensible formula for computing one's retirement pension. Veto Message of President Ford of October 12, 1974, 120 Cong. Rec. H10546 (daily ed., Oct. 15, 1974).

lee class. Yet they were divested, in order to provide higher benefits to other beneficiaries. Moreover, the evidence is overwhelming that, at a minimum, Congress was not reasonably apprised of the effect of the challenged provision on the appellee class and, indeed, indicated in their statement of the purposes of the 1974 Act that appellee's class was fully protected.

Taken together, these factors evidence a disregard for equal treatment of similarly situated individuals. The reasons advanced for this discrimination are unrelated to the recognition of credited service; "loyalty" to one industry or another is not here involved and even if it were, such a factor has never been cited as a legitimate rationale for distinguishing between vested beneficiaries, all of whom have served the same periods of time and made the same contributions. The nexus of eligibility of all former railroaders for dual benefits is their vested entitlement under both programs.

The distinctions between the two groups on the basis of the timing of their railroad service is not an aspect of this nexus of eligibility, especially since such distinction was formulated after appellee's class had already achieved a vesting of their benefits in strict accordance with the law and had left the roads, many times not of their own volition, for other employment. For this reason, the Act creates an invidious discrimination, and the district court's conclusion to that effect should be affirmed.

Respectfully submitted,

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No. 79-870

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE APPELLANT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE APPELLANT

Appellee concedes (Motion to Affirm 7) that Congress could have eliminated "windfall" or dual benefits under the Social Security Act and the Railroad Retirement Act for all present and former railroad employees. See also *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). Appellee merely takes issue with the particular lines Congress has drawn in preserving these benefits for certain present and former railroad employees while eliminating them for others,

based on Congress' weighing of the equities of the employees concerned and the needs of the railroad retirement system. See *Mathews* v. *Diaz*, 426 U.S. 67, 82-84 (1976). But in the "withholding of a noncontractual benefit under a social welfare program * * * the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); see also *Califano* v. *Aznavorian*, 439 U.S. 170, 177 (1978). The classification appellee attacks here plainly has a rational justification.

1. Stripped of its innuendo and erroneous and irrelevant assertions about the manner in which management and labor submitted the draft bill to Congress (Motion to Affirm 6, 11-17, 19),[1] appellee's legal

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[1] As demonstrated in the Jurisdictional Statement (at 19-24) and the Brief of Amicus National Railway Labor Conference (at 16-31; see particularly pages 19-21 & n.26, 27-29 & n.33), the Joint Labor-Management Negotiating Committee fully explained the operation of 45 U.S.C. 231b(h) to Congress. Moreover, the very language of that section and the portions of the committee reports, hearing transcripts, and Congressional Record explaining it (as opposed to the general statements elsewhere in the reports and hearing transcripts relied upon by appellee, Motion to Affirm 10, 14-15) conclusively establish that Congress was aware that former railroad employees in appellee's class would not receive full "windfall" benefits. But even if, as appellee suggests, Congress was unaware of the precise impact of the plain language it enacted, that would not render the statute irrational. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 89 (1977).

Appellee's references to action taken by Congress in 1954 to correct perceived unfairness in an amendment to the Act

argument is simply that Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), is unconstitutional because it irrationally distinguishes between classes of annuitants who are "identically" or "similarly" situated (Motion to Affirm 3-4, 18-19). This argument must fail because its premise is incorrect: appellee and the class he represents are not situated similarly to those who will receive full "windfall" benefits under 45 U.S.C. 231b(h).

It is true that the members of appellee's class, like those who are entitled to receive "windfall" benefits under 45 U.S.C. 231b(h), had completed the requisite 10 years of railroad service and were permanently

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passed in 1951 (see Motion to Affirm 4, 13 n.8) and statements made by a single Member of Congress after the passage of the 1974 Act (*see* Motion to Affirm 16-17) merely indicate that Congress, or its individual members, sometimes believe prior enactments to have been unwise, and reveal the wisdom of deferring to the political process to correct what may be perceived as inequities or oversights in legislation. See *Vance* v. *Bradley*, 440 U.S. 93, 97 & n.12 (1979).

Typical of appellee's mischaracterization of the legislative record is his suggestion (Motion to Affirm 16-17) that William Dempsey, Chairman of the National Railway Labor Conference, misled a Senate subcommittee in 1976—well after passage of the 1974 Act—by erroneously explaining the operation of 45 U.S.C. 231b(h) as it would affect persons in appellee's position. This is simply wrong. Dempsey's statement focused on the very issue involved in this case and, *in the very passage cited by appellee*, explicitly observed that a person who left the railroad industry in 1955 with 10 years of railroad service but "did not have enough social security service at that time to qualify for a social security benefit * * * does not get the * * * windfall dual benefit." *Railroad Retirement Act Amendments, 1976: Hearing on S. 3662 Before Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 49 (1976).

"vested" under the Social Security Act as of January 1, 1975, the effective date of the Railroad Retirement Act of 1974. But the similarity ends there. In order to be eligible for the full "windfall" benefit appellee seeks,[2] a retired railroad employee must have been employed in the railroad industry during 1974 or must have had a "current connection" with the industry—*i.e.*, worked for a railroad employer in 12 of the preceding 30 months (45 U.S.C. 231(*o*))—either on the effective date of the 1974 Act or when he subsequently retired. 45 U.S.C. 231b(h)(1).[3] Thus, the full "windfall" component is available only to employees who had an affiliation with the industry at the time Congress considered and passed the legislation or when they later retired.

Appellee's class, on the other hand, consists of former railroad employees who left the railroad industry more than one year before the effective date

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[2] As explained below (see pages 7-8, *infra*), a lesser "windfall" benefit is available for certain employees who, like appellee, left the railroad industry before 1974 and had no "current connection" with the industry when the 1974 Act was passed.

[3] A retired railroad employee is also entitled to full "windfall" benefits if he completed 25 years of railroad service as of the effective date of the 1974 Act, even if he left the industry before 1974 and did not have a "current connection" with it at that time or when he later retired. 45 U.S.C. 231b(h)(1). Appellee concedes (Motion to Affirm 8 n.4) that Congress could properly distinguish employees in this category by regarding them as "career railroaders" entitled to full "windfall" benefits under 45 U.S.C. 231b(h)(1).

of the 1974 Act, retained no "current connection" with the industry on the effective date of the Act, and did not return to the industry after the effective date and thereby reestablish a "current connection" with the railroad industry prior to their retirement. Appellee's class, in other words, consists of those who no longer had any relationship with the industry for which the railroad retirement system was designed, either when the 1974 Act was passed or when they retired.

Congress may make eligibility for social welfare benefits turn on the *character* as well as the *duration* of a person's railroad work and may distinguish between those who have a lingering affinity with the industry it has chosen to regulate and those who do not. See *Mathews* v. *Diaz*, *supra*, 426 U.S. at 82-83. As this Court noted in *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 573, the Railroad Retirement Act provides a system of benefits for "persons who pursue careers in the railroad industry." Congress could rationally determine that those who were in the railroad industry in 1974, or subsequently returned to the industry before their retirement, were more likely to be among the class of "persons who pursue careers in the railroad industry" than those who had left the industry before 1974 and never returned.

Moreover, the Court noted in *Hisquierdo* that the Act has as its purpose to "encourage older workers to retire by providing them with the means 'to enjoy the closing days of their lives with peace of mind and physical comfort,' and so [to] 'assure more rapid

advancement in the service' and also more jobs for younger workers." 439 U.S. at 573-574, quoting H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 (1935). It was not necessary in 1974 for Congress to retain whatever incremental incentive to retire is created by the "windfall" benefit provision for those who had already left the railroad industry—*i.e.*, for those whose retirement would not assure more rapid advancement and more jobs for younger workers in the industry. Congress could also rationally have determined that those who left the railroad industry permanently would, in general, be less dependent on their railroad retirement annuities for retirement security than those who remained in the industry, perhaps because their non-railroad employers might have a pension plan similar to that provided under the Act.

It must be emphasized as well that all that is at issue here is eligibility for *one* component of the total government-sponsored retirement benefits to which a former railroad employee is entitled. Under the 1974 Act, a railroad employee with at least 10 years of railroad service receives an annuity comprised of at least two components. The first corresponds to the amount he would receive if his railroad work were covered by the Social Security Act, 45 U.S.C. 231b(a), subject, of course, to the offset in 45 U.S.C. 231b(m) for social security benefits received directly for non-railroad work (see J.S. 7-8). The second component is based solely on earnings in the

railroad industry and is analogous to a private pension. 45 U.S.C. 231b(b). See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574-575. The members of appellee's class will receive these two components of their annuity in full. The "windfall" component in 45 U.S.C. 231b(h) that appellee's class will not receive is being phased out because of the drain on the Railroad Retirement Account the payment of full dual benefits had caused in the past and because Congress thought it anomalous and unfair that, under a program designed to benefit railroad workers, persons who divided their careers between railroad and nonrailroad work would actually receive greater total benefits than those who spent their entire careers in the railroad industry. See J.S. 5-6. Surely, in arriving at the most equitable manner for phasing out the "windfall" occasioned by the receipt of dual benefits, Congress could rationally conclude that the component at issue here is less of a "windfall" or an anomaly for those workers who had an affiliation with the railroad industry when Congress considered the legislation or when they retired than for those who did not.

Finally, appellee is simply wrong in suggesting (Motion to Affirm 3-4) that the only railroad employees "vested" under both the Railroad Retirement Act and the Social Security Act by January 1, 1975, who can qualify for "windfall" benefits are those who worked for the industry in 1974 or had a "current connection" with the industry at the close of 1974. Congress provided in 45 U.S.C. 231b(h) that persons

with 10 years of railroad service who, like appellee, left the railroad industry before 1974 without retaining a "current connection" with the industry could nevertheless receive a "windfall" benefit [4] *if* they were "vested" under the Social Security Act at the close of the year in which they last performed railroad work.[5] Thus, the only otherwise eligible former railroad employees denied "windfall" benefits are those who, again like appellee, had no statutory entitlement to dual benefits at the time they left the railroad industry but *thereafter* (and prior to January 1, 1975) became eligible for dual benefits when they performed enough non-railroad work to become eligible for social security benefits. Congress could legitimately choose to preserve the statutory entitlement to "windfall" benefits only for persons who had actually accrued that entitlement while still employed in the railroad industry.

2. Congress was confronted in 1974 with the possible bankruptcy of the Railroad Retirement Account stemming in large measure from the drain on the Account caused by annuitants who received dual bene-

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[4] This benefit under 45 U.S.C. 231b(h)(2) is somewhat smaller than the benefit under 45 U.S.C. 231b(h)(1) for those who had an affiliation with the industry in 1974. *See* J.S. 9-10 n.5.

[5] Appellee likewise fails to mention that a former railroad employee who had no affiliation with the industry in 1974 could also receive a "windfall" benefit under 45 U.S.C. 231b(h)(1) if he had 25 years of railroad service by 1974 or if he later returned to railroad work and reestablished a "current connection" before he retired.

fits under the Social Security Act and the Railroad Retirement Act. The 1974 Act sought to restore the solvency of the Account by eliminating "windfall" benefits in the future (see J.S. 4-5). At the same time, Congress recognized that many employees in the railroad industry—and many former railroaders—who had already become "vested" under both programs or might do so before they retired had an expectation that they would receive benefits under both the Social Security Act and the Railroad Retirement Act upon retirement.

In balancing the fiscal needs of the railroad retirement system against the expectations of present and former railroad workers, Congress could have written a broad grandfather clause that preserved the potential for receiving maximum benefits under both acts for everyone who had ever worked in the railroad industry before the effective date of the 1974 Act, whether or not the worker had remained in the railroad industry or had yet performed any non-railroad work that could be credited toward eligibility under the Social Security Act. But this would have continued a sizable drain on the Account for many years. Congress therefore sought to tailor the class of potential recipients of "windfall" benefits to correspond more closely to those who it believed had the strongest equitable claim to receiving such benefits.

Appellee concedes (Motion to Affirm 8 n.4) that some of the lines drawn by Congress in tailoring the class of eligible recipients are valid. For example, he does not contest Congress' decision to grant full

"windfall" benefits to former railroad employees who had completed 25 years of service by the effective date of the 1974 Act, even though they, like appellee, may have left the industry before 1974 and had no "current connection" with the industry in that year or when they retired. 45 U.S.C. 231b(h)(1). Appellee also concedes (Motion to Affirm 8 n.4) that Congress properly limited eligibility for "windfall" benefits to those who had performed the 10 years of railroad work necessary to become eligible for a railroad retirement annuity prior to the effective date of the 1974 Act. But an employee who had, for example, completed sufficient non-railroad work to be "vested" under the Social Security Act by the effective date of the 1974 Act but had only nine years and eleven months of railroad work by that time might have had as strong an expectation of receiving dual benefits under both acts as appellee, but he too would be denied any windfall benefits because he needed one more month of railroad work to become "vested" under the Railroad Retirement Act.

Thus, no matter what lines Congress drew—short of grandfathering everyone who had ever worked in the railroad industry before the effective date of the 1974 Act—they would have produced "some harsh and apparently arbitrary consequences." *Mathews* v. *Diaz, supra,* 426 U.S. at 83. But it is no objection to a statutory classification that "such rules [may] produce seemingly arbitrary consequences in some individual cases," *Califano v. Jobst,* 434 U.S. 47, 53 (1977), and Congress was not required to take an

all-or-nothing approach to the problem of "windfall" benefits. A grandfather provision embodying a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Duke*, 427 U.S. 297, 305 (1976). Indeed, if it were, the result might have been to deny "windfall" benefits to everyone, because Congress might have been unwilling to assume the financial burden of extending eligibility well beyond that provided in the 1974 Act.

For the foregoing reasons, as well as those set forth in the Jurisdictional Statement, probable jurisdiction should be noted. We also renew our suggestion of summary reversal.

Respectfully submitted.

WADE H. MCCREE, JR.
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No. 79-870

In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

vs.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal from the United States District Court for the Southern District of Indiana.

RESPONSE IN OPPOSITION TO MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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The appellee opposes the National Railway Labor Conference's motion for leave to file brief as *amicus curiae* for the following reasons:

1. The National Railway Labor Conference's motion does not satisfy the requirements of Rule 42(1) of the Supreme Court of the United States since that motion

is untimely. The National Railway Labor Conference's motion was received by the appellee only three business days before appellee's response to the appellant's Jurisdictional Statement was due and after appellee's brief had been submitted to the printer, thereby precluding appellee from responding to the *amicus* brief if leave of Court were granted for its filing.

2. The National Railway Labor Conference's motion does not satisfy the requirements of Rule 42(3) of the Supreme Court of the United States since the motion does not show what facts or questions of law have not been adequately presented by the appellant in the appellant's Jurisdictional Statement.

3. The National Railway Labor Conference's brief is, furthermore, a redundancy which, in general, does no more than restate the points raised in the appellant's Jurisdictional Statement, and contains errors of law and fact.

4. The filing of the *amicus* brief creates the possibility of unwarranted delay in this Court's resolution of the appeal. The district court below granted the appellant a stay of its judgment on the condition that the appeal be progressed expeditiously so as to minimize the injury presently being suffered by appellant's class during the time of the stay.

For the reasons above stated, the appellee requests the Court to deny the National Railway Labor Conference's motion for leave to file brief *amicus curiae* in support of the Jurisdictional Statement.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the Southern District of Indiana

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MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of this Court, the National Railway Labor Conference hereby moves the Court for leave to file the attached *amicus* brief in support of the Jurisdictional Statement, as the consent of counsel for the Appellee to the filing of such a brief has not been received.

The National Railway Labor Conference is an unincorporated association which includes most of the nation's Class I railroads among its members. Among other things, it represents those railroads in a wide variety of

labor relation problems of concern to the railroad industry generally, including those relating to legislation or proposed legislation concerning the retirement benefits of railroad employees, their spouses and survivors. A committee established within the Conference, the National Carriers' Conference Committee, normally represents member railroads in national negotiations with unions representing their employees. The members of the National Carriers' Conference Committee were the management members of a Joint Labor-Management Railroad Retirement Negotiating Committee established by the Congress which, at the direction of the Congress, drafted the bill which with some changes was enacted by the Congress as the Railroad Retirement Act of 1974.

For those and other reasons, the decision below holding an important aspect of that legislation to be unconstitutional is a matter of major importance to the Conference and its member railroads. If not reversed, that decision will upset the solution adopted by the Congress in 1974 to the problem of windfall dual benefits, which threatened the solvency of the railroad retirement system. According to the Jurisdictional Statement (n.8, p. 15), the Railroad Retirement Board has estimated that the additional benefits required to be paid by the decision below will result in a cost to the system of some $119 million a year for each of the next 20 years, or some $2.38 billion in all. Among other things, the decision below exhibits a misunderstanding of the 1974 Act, its background and legislative history, including the role of both management and labor members of the Joint Negotiating Committee. We believe that this brief will assist the Court by correcting those misunderstandings and in otherwise supplementing the factual statements and legal arguments contained in the Jurisdictional Statement.

For these reasons, we request the Court to enter an order granting this motion so as to permit the filing of the attached *amicus* brief.

Respectfully submitted,

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

This *amicus* brief is being filed with the leave of the Court pursuant to its Rule 42.

INTEREST OF AMICUS CURIAE

As is more fully set forth in the motion for leave to file, the National Railway Labor Conference and its member railroads are vitally concerned with the decision below holding an important aspect of the Railroad Retirement Act of 1974 to be unconstitutional. That statute provides retirement benefits to railroad employees, upon retirement, which largely are financed through employment taxes paid by the nation's railroads, almost all of which are members of the Conference. The members of

a committee of the Conference were the management members of a Joint Labor-Management Railroad Retirement Negotiating Committee which, at the direction of the Congress, drafted the bill that was enacted with some changes as the 1974 Act.

Hence, the Conference is thoroughly familiar with the background and purposes of that legislation, including the "windfall" dual benefit provisions held to be unconstitutional by the District Court. We believe that a fuller exposition of that background than is contained in the Jurisdictional Statement will expose even more clearly the error of the decision below. In particular, we shall demonstrate that the distinctions made by the Congress in phasing out "windfall" dual benefits, rather than being irrational as concluded by the lower court, were based upon factors—long-term railroad service and a "current connection" with the railroad industry—that the Congress historically has considered to justify more favorable treatment under the railroad retirement system which primarily is intended to provide benefits for career railroad employees.

STATEMENT OF THE CASE

A. The Establishment and Development of the Railroad Retirement System.

(1) The railroad retirement system is the only Federal retirement program applicable to a single private industry. As this Court recently observed, it "provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry" and was established to "encourage older workers to retire" so as to " 'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573-574 (1979). When the initial effort to accomplish that purpose was aborted

by a decision of this Court [1] holding the Railroad Retirement Act of 1934 (48 Stat. 1283) to be unconstitutional "on the ground that it took property in violation of the Fifth Amendment and exceeded Congress' power under the Interstate Commerce Clause," the "Congress then promptly enacted substantially similar legislation in 1935 based on its power to tax and spend to promote the general welfare. 49 Stat. 967, and 974." *Id.*, at 572 n. 3. And, when "the operation of that legislation was enjoined" by a lower court,[2] "Presidential intervention and extensive negotiations" between the railroads and the unions representing their employees produced a bill "that became the Railroad Retirement Act of 1937. 50 Stat. 307." *Ibid.*

The Railroad Retirement Act of 1937 (hereinafter the "1937 Act"), as amended from time to time, thus provided the statutory basis for railroad retirement benefits until the enactment of the Railroad Retirement Act of 1974 (hereinafter the "1974 Act"), effective January 1, 1975.[3] Those benefits generally have been financed by employment taxes imposed upon both the railroads and their employees, based upon employee compensation from

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[1] *Railroad Retirement Board* v. *Alton*, 295 U.S. 330 (1935).

[2] *Alton R. Co.* v. *Railroad Retirement Board*, 16 F. Supp. 955 (D. D.C. 1936). But see, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *State of California* v. *Anglim*, 129 F.2d 455 (9th Cir. 1942), cert. den., 317 U.S. 669 (1942).

[3] The 1937 Act, as amended prior to the 1974 Act, is set forth in the 1970 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 228a-228z-1, while the 1974 Act as amended is set forth in the 1976 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 231-231t. For convenience and in view of the difference in section numbers, references to specific provisions of the 1937 Act hereinafter are cited to the appropriate section of the 1970 edition of 45 U.S.C. while references to specific provisions of the 1974 Act are cited to the appropriate section of the 1976 edition of 45 U.S.C. Both are included in 45 U.S.C.A.

railroad service up to a monthly maximum.[4] Both the benefits and the taxes consistently have been substantially higher than comparable social security benefits and taxes. See Report of the Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H. Doc. 92-350 (1972) (hereinafter "CRR Report"), at 7-8, 14, 17-18.

(2) As the Commission on Railroad Retirement observed, "[a]t the outset the railroad retirement system was almost solely a career employee retirement program and this emphasis remains the primary thrust of the system to this day." CRR Report, at 6-7. Among other things, the "retirement benefit formula was structured primarily to reward length of career service in the railroad industry," while the "social security system has developed along lines which emphasize social adequacy rather than career service." CRR Report, at 7. To a certain extent, that emphasis upon rewarding career railroad service in the railroad retirement benefit formula was diluted by amendments of the 1937 Act which imported features of the social security system (CRR Re-

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[4] Such taxes are now imposed by the Railroad Retirement Tax Act (Chapter 22 of the Internal Revenue Code), 26 U.S.C. §§ 3201-3233. At present, both the railroads and their employees pay a tax rate that automatically is the same as the social security tax rate (now 6.13%) for employers and employees. See 26 U.S.C. §§ 3101, 3111, 3201, 3221(b). Since a 1973 amendment (87 Stat. 162), the railroads alone have paid an additional tax in the amount of 9.5% of taxable compensation. 26 U.S.C. § 3221(a). Prior to that amendment, the tax in excess of social security taxes was divided equally between the railroads and their employees, except that since a 1966 amendment (80 Stat. 1078) the railroads alone have paid a supplemental tax to finance the cost of certain supplemental benefits. See p. 6, *infra*. The rate of that supplemental tax, which is applicable to man-hours of compensated work, is fixed for each calendar quarter by the Railroad Retirement Board at a level intended to "make available sufficient funds . . . to pay supplemental annuities. . . ." 26 U.S.C. § 3221(c). For the last quarter of 1979, that rate is 12.5 cents for each such man hour. 44 Fed. Reg. 49538.

port, at 6-7), and particularly by a 1951 amendment guaranteeing that railroad retirement benefits would at least be equal to those that would be paid by social security.[5] "This changed the railroad retirement system into a family income maintenance program by establishing the entire social security benefit structure as a floor within the railroad retirement system while retaining all its earlier staff pension elements." CRR Report, at 7-8.

At the same time in 1951, however, the Congress adopted an amendment intended to confine "the Railroad Retirement System . . . to its original purpose" of meeting "the retirement needs of railroad career employees" who "make railroading their life's work." [6] That amendment introduced a requirement that an employee have at least 10 years of railroad service to be entitled to any railroad retirement benefits upon retirement.[7] If less than 10 years, railroad service is transferred to the social security system and included with the individual's other employment in computing social security benefits.[8]

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[5] Section 3(e) of the 1937 Act, as amended by § 8 of the 1951 amendments (65 Stat. 685) among others, 45 U.S.C. § 228c(e). A similar guarantee is contained in § 3(f)(3) of the 1974 Act, 45 U.S.C. § 231b(f)(3).

[6] H. Rept. No. 976, 82d Cong., 1st Sess. (1951), at 47-48. See also, S. Rept. No. 890, 82d Cong., 1st Sess. (1951), at 14-16, 27, 56, 68.

[7] Section 2(a) of the 1937 Act, 45 U.S.C. § 228b(a), was amended by § 2 of the 1951 amendments (65 Stat. 683) to make at least 10 years of rail service one of the eligibility requirements for an employee retirement benefit. That requirement was carried forward into § 2(a)(1) of the 1974 Act, 45 U.S.C. § 231a(a)(1). Certain conforming changes were made in other provisions of the 1937 Act and are now contained in the 1974 Act.

[8] Section 5(k)(1) of the 1937 Act, as amended by § 22(a) of the 1951 amendments (65 Stat. 687), 45 U.S.C. § 228e(k)(1), and included in the 1974 Act as § 18(2), 45 U.S.C. § 231q(2).

Length of railroad employment also historically has been the basis of several other distinctions favorable to long-service employees. When first enacted, eligibility for an annuity under § 2(a) of the 1937 Act (50 Stat. 309) generally was dependent upon attaining age 65, but individuals with 30 or more years of railroad service could retire on a reduced annuity after attaining age 60 and were eligible for a disability annuity at any age while disabled from work in their regular occupation with the railroads. The reduction for age in the amount of the annuity payable to individuals retiring after age 60 with 30 or more years of service was eliminated for women by a 1946 amendment (60 Stat. 727) and for men by a 1973 amendment (87 Stat. 162). The 1946 amendment also authorized the payment of such a disability annuity to otherwise eligible individuals who had either attained age 60 or had 20 or more years of service (60 Stat. 727). Those exceptions to the age-65 requirement, as contained in the amended 1937 Act (45 U.S.C. § 228b (a)), are now included in § 2(a)(1) of the 1974 Act (45 U.S.C. § 231a(a)).[9] In addition, a 1966 amendment added a provision, as § 3(j)(1) of the 1937 Act (80 Stat. 1073), for the payment of supplemental annuities (over and above the amount of the annuities normally payable) to individuals who, among other things, had 25 or more years of service and had attained age 65. Those provisions of the 1937 Act (45 U.S.C. § 228c(j)(1)) are included in § 2(b)(1) of the 1974 Act (45 U.S.C. § 231 a(b)(1)) as revised to permit the payment of supplemental annuities also to otherwise eligible individuals

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[9] Section 2(a)(1) of the 1974 Act also adopted and continued those aspects of § 2(a) of the 1937 Act as amended under which employees with 10 or more years of railroad service may qualify for a reduced annuity upon attaining age 62 and for a disability annuity regardless of age or years of service if disabled from engaging in any regular employment, not simply their railroad occupation.

with 30 or more years of service who have attained age 60.

(3) The primary purpose of the railroad retirement system to provide retirement benefits for career railroad employees also historically has been reflected in provisions that favor individuals who maintained an employment relationship or current connection with the railroad industry. Indeed, such provisions are traceable, at least in part, to one of the reasons assigned by this Court in the *Alton* case for holding the Railroad Retirement Act of 1934 to be unconstitutional. See n. 1, p. 3, *supra*, and accompanying text.

Among other things, the 1934 Act made "eligible for pensions all who were in carrier service within one year prior to its passage, irrespective of any future reemployment." 295 U.S., at 348. This included persons who had permanently left railroad service, whether because discharged for cause or to take employment in some other industry, as well as those who were "merely on furlough" from railroad service or "temporarily relieved from duty subject to call . . . ." *Ibid.* The majority concluded that it was "arbitrary in the last degree," and thus a violation of Due Process, "to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service," or who otherwise were permanently separated from railroad employment before the statute was enacted. *Id.*, at 349. And while the four dissenters (Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo) disagreed with all the other bases for the *Alton* decision, they agreed that it was "arbitrary and beyond the power of Congress" to require the payment of annuities to persons who had "been discharged for cause" or had otherwise "left the service and may not return." *Id.*, at 389.

That defect was remedied in the 1937 Act by provisions under which only employees on the enactment date could receive credit for prior service [10] (§ 3(b), 50 Stat. 310); but "employee" was defined to include both persons actually engaging in railroad service for compensation and those having an "employment relation" with a carrier (§ 1(b), 50 Stat. 308); and an "employment relation" was defined generally to include persons on furlough subject to recall or on leave of absence, in accordance with the established rules and practices of the employing carrier (§ 1(d), 50 Stat. 308). In a 1946 amendment (60 Stat. 725), however, the definition of "employment relation" was revised, principally by eliminating the reference to persons on furlough and to include persons "in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive . . . ." Section 1(d) of the 1937 Act as so revised (45 U.S.C. § 228a(d)) is included in the 1974 Act as § 1(e) (45 U.S.C. § 231(e)).[11]

The Congress so revised the definition of "employment relation" because the initial definition had worked in a manner deemed to be "unjustifiable by standards of equity" in that some persons were denied credit for pre-enactment service even though they "had not gone into other employment, still considered themselves part of the railroad industry, expected to return when employment improved, and did in fact return in seniority order when the industry required their services," while some of the

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[10] The term "enactment date" was defined in § 1(j) of the 1937 Act to mean August 29, 1935 (50 Stat. 309, 45 U.S.C. § 228a(j)). That was the enactment date of the 1935 Act (49 Stat. 967), which contained generally similar provisions in §§ 1(b) and (d) (49 Stat. 968).

[11] The provisions in the 1937 Act defining "employee" (45 U.S.C. § 228a(b)) and governing the credit of prior service (45 U.S.C. § 228c(b)) are included in the 1974 Act as § 1(b) (45 U.S.C. § 231(b)) and § 3(i)(3) (45 U.S.C. § 231b(i)(3)).

persons who could receive credit for pre-enactment service "had actually left the railroad industry and . . . never returned to it." S. Rept. No. 1710, 79th Cong., 2d Sess. (1946), at 7-8. The Congress sought to "correct both" inequities "by extending prior service credit to those who have returned and served for at least 6 months" while denying such "credit to those who had left the industry and have made no contribution." *Ibid.*

The 1946 amendments also introduced into the 1937 Act the related concept of a "current connection with the railroad industry," which as defined in § 1(o) of the amended Act (60 Stat. 726) generally required at least 12 months of railroad service during the 20 months preceding the individual's retirement or death. Among other things, the 1946 amendments made the existence of a "current connection" a prerequisite for the payment of benefits to survivors of a deceased employee under § 5 of the amended Act (60 Stat. 729) and for the payment of benefits to employees disabled for work in their regular railroad occupation under § 2(a) of the 1937 Act as revised by the 1946 amendments (60 Stat. 727; see p. 8, *supra*). Murray W. Latimer, then the Chairman of the Railroad Retirement Board, testified that the "current connection" requirement "attempted to divide persons who have worked in the railroad industry" between those "who are regular railroad employees and those who are not." [12] While it "attempts to substitute another concept for the concept of employment relation," it "has the same aim in view," and was proposed because the "definition of 'employment relationship' . . . would not easily be applicable to a continuing situation" and would be very difficult to administer.[13]

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[12] Hearings on H.R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1946), at 168.

[13] Hearings on H.R. 1362, *supra* at 49, 168-169.

The 1937 Act continued thereafter to require a "current connection" as defined in § 1(o), 45 U.S.C. § 228a (o), with respect both to eligibility for survivor benefits under § 5, 45 U.S.C. § 228e, and to eligibility for certain disability benefits under § 2a, 45 U.S.C. § 228b(a). And, when the Congress amended the 1937 Act in 1966 to provide for the payment of a supplemental annuity to certain long-term railroad employees (see p. 6, *supra*), a "current connection" was made one of the eligibility requirements therefor (§ 3(j)(1), 80 Stat. 1073). All of those aspects of the 1937 Act were carried over into and are now part of the 1974 Act. A "current connection" is defined in § 1(o) (45 U.S.C. § 231(o)); and is required as to disability benefits under § 2(a)(1)(iv) (45 U.S.C. § 231a(a)((iv)), as to a supplement annuity under § 2(b)(1) (45 U.S.C. § 231a(b)(1)), and as to survivor annuities under § 2(d)(1) (45 U.S.C. § 231a (d)(1)).

B. The Windfall Dual Benefit Problem and the Report of the Commission on Railroad Retirement.

(1) While the railroad retirement system always has been separate from the social security system as to both the benefits payable and the taxes imposed to finance those benefits, in time the two systems were partially coordinated so that the railroad retirement system in essence consisted of a level of benefits and taxes generally equivalent to those paid or imposed by the social security system and a second or "staff" level providing additional benefits and imposing additional taxes. Insofar as the 1937 Act was concerned, this partial integration largely was accomplished by 1951 amendments that generally guaranteed a minimum level of railroad retirement benefits equivalent to what social security would pay (see pp. 4-5, *supra*) and that provided for a financial interchange between the two systems (65 Stat. 687).

Under the financial interchange, the railroad retirement system turns over to the social security system that portion of railroad retirement taxes equivalent to what social security would have collected and receives back from social security amounts equivalent to whatever additional benefits that that system would have paid, if railroad employment were included within the social security system. See CRR Report, at 8.[14]

(2) Individuals could continue to qualify for benefits under both systems, however, both in their own right and as spouses or survivors, through employment—for both railroads and for other businesses (or self-employment) covered by social security—sufficient to meet the minimum length-of-service requirements of both the railroad retirement system (10 years of railroad service) and the social security system (generally 40 quarters of employment). Upon retirement, therefore, such individuals were paid benefits for which they were otherwise qualified by both the railroad retirement and the social security systems.

There is nothing inequitable, of course, in the payment of benefits under both systems to persons who qualify under both systems by reason of work for both railroad and nonrailroad employers. That continues to be done after, as well as before, enactment of the 1974 Act. The problem was that, before the 1974 Act more fully coordinated the social security level of benefits under the

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[14] Thus, with respect to an individual who had both railroad and nonrailroad service, the social security system deducts the amount it actually pays him on the basis of his nonrailroad service and credits the railroad retirement system with the remainder. If he had only railroad service, the full amount of what social security would have paid on the basis of that service is credited to the railroad retirement system. The financial interchange was provided for in § 5(k)(2) of the amended 1937 Act, 45 U.S.C. § 228e(k)(2), and is now provided for in § 7(c)(2) and (3) of the 1974 Act, 45 U.S.C. § 231f(c)(2) and (3).

two systems, the weighting of the formula under which social security benefits are computed resulted in dual beneficiaries receiving total social security level benefits that substantially exceeded the benefits that social security would have paid on the basis of combined railroad and nonrailroad service.[15]

It was that excess or "windfall" amount which the Commission on Railroad Retirement identified and condemned as inequitable. See, *e.g.*, CRR Report, at 4, 8-9, 24, 353-355. "Windfalls in dual benefits seriously distort the benefit system for railroad workers and their families. They cause workers who serve the railroad industry for shorter periods to receive higher combined RR/OASDI benefits for their contribution dollar than career workers who spend their entire lives in the industry." CRR Report, at 355. The Congress that enacted the 1974 Act agreed that such windfall dual benefits "are inequitable in the sense that a minority of railroad em-

[15] Under the Social Security Act, benefits as compared to service and compensation are comparatively higher in regard to relatively short service and low wage employees than in regard to those with relatively long service and high wages; however, artificial distortions are avoided by combining service for and compensation from all employers subject to the Act in computing both benefits and taxes. On the other hand, the social security portion of railroad retirement benefits was computed on the basis of railroad service alone, rather than on the basis of all employment and compensation, so that the effect of the weighting of the social security benefit formula was artificially enhanced. See, *e.g.*, CRR Report, at 112-113, 128-129, 349-350, 474. To give a simplified hypothetical example, if 10 years of service under social security would produce a monthly benefit of $300, an additional 10 years under that system at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to, say, $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the social security component of the railroad retirement benefit would also be $300, for a total social security level benefit of $600, since in each instance the weighted social security formula would be applied to only 10 years of service. The $100 difference in the example constitutes the "windfall."

ployees receive an advantage not available either to the majority of career railroad employees—those who spend their entire working life in the railroad industry—or to employees in other private industries." [16]

The windfall dual benefit problem was not limited, moreover, to those artificial and inequitable distortions in the amounts of social security level benefits. Even though those windfall amounts resulted from non-railroad employment of railroad employees and from the social security benefit formula, under the financial interchange the entire cost of such excess or windfall benefits was borne by the railroad retirement system.[17] By 1974, the cost to the railroad retirement system was "in excess of $4 billion," and was responsible for 7.72% of the 9.05% (of taxable payroll) actuarial deficit in the railroad retirement account,[18] so that it was primarily those costs which "threaten[ed] the existing system with bankruptcy." [19]

(3) Because of concern about the solvency of the railroad retirement system (see CRR Report, at 5), when the Congress in 1970 enacted a 15% general increase in the level of benefits payable, it also established the Commission on Railroad Retirement to conduct a study of the system "for the purpose of recommending to the Congress on or before July 1, 1971, changes in such system to provide adequate levels of benefits . . . on an

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[16] H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974), at 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974), at 11. Hereinafter, in instances where those committee reports on the bill enacted as the 1974 Act are identical (or substantially identical) in substance and in pagination, they will be jointly cited as "Committee Reports" together with the page or pages appropriate to both.

[17] Committee Reports, at 2-3; CRR Report, at 8-9, 24, 73, 129-130, 344.

[18] Committee Reports, at 2, 7-8.

[19] Committee Reports, at 1-2; see, also, *id.*, at 7-8.

actuarially sound basis" (84 Stat. 791, 793), and it provided that the 15% increase was to expire on June 30, 1972. A 1971 statute (85 Stat. 101) allowed the Commission an additional year, until June 30, 1972, in which to make its report; enacted a further 10% general increase in the level of railroad retirement benefits; and provided that both that increase and the earlier 15% increase would expire on June 30, 1973.

The Report of the Commission on Railroad Retirement (see p. 4, *supra*), dated June 30, 1972, already has been referred to from time to time herein. Among other things, it identified "dual benefits and their attendant windfalls" as a "key problem," the solution of which "is crucial because it involves heavy costs and large considerations of equity, and also reflects a major structural imperfection in the system." CRR Report, at 24. The Commission recommended that future accruals of windfall benefits be eliminated by establishment of a two-tier system. The first tier would consist of social security benefits (and taxes), to be provided by making the Social Security Act (and FICA) directly applicable to railroads and their employees, so that such benefits would be computed under that Act on the basis of combined railroad and nonrailroad employment and "the excess element will automatically be eliminated." CRR Report, at 24; see, also, *id.*, at 3-4, 21-23. The second tier would consist of "a separate, supplementary railroad staff pension system," based upon railroad employment alone, "with taxes and benefits set under Federal law administered by the Railroad Retirement Board." CRR Report, at 23; see, also, *id.*, at 3-4, 21-22.

The Commission also recommended that "legally-vested rights of railroad workers and railroad retirement beneficiaries" to a windfall dual benefit be preserved. CRR Report, at 4. Under the Report's definition of "legally vested," "vested benefit" and "vesting" (pp. 552, 555),

this meant that persons already retired and receiving such a windfall as of the changeover date to the new two-tier system would continue to receive the same windfall amount, and that persons not yet retired (and their spouses and survivors) who, as of that changeover date, had sufficient railroad and nonrailroad employment to satisfy the minimum length-of-service requirements of both the railroad retirement and social security systems would, upon retirement, be paid a windfall amount based upon such service prior to the changeover date. Persons not so vested but who, by reason of both railroad and nonrailroad employment prior to the changeover had paid social-security level taxes in excess of what would have been paid under social security if applicable to a combination of that employment, would have that excess refunded by a lump-sum payment. CRR Report, at 24. In addition, the Commission recommended that the benefit formula applicable to the second tier of benefits be restructured to eliminate a "compounding" problem that threatened to "escalate costs to an untenable extent" and to correct other "anomalies" so as to "make benefits more equitable among the various groups of beneficiaries." CRR Report, at 4-5.[20]

(4) The Congress was not willing to accept or otherwise act immediately upon the Commission's recommendations. In a 1972 statute which enacted a third general increase (20%) in the level of railroad retirement bene-

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[20] The "compounding" problem generally resulted from the fact that percentage increases in the level of benefits, intended to provide more adequate benefits "for beneficiaries already on the rolls whose wage base reflects earlier years when pay rates were lower," had "also been applied to new retirees whose wage base is related to more recent, higher wages." CRR Report, at 24-25. The correction recommended in regard to relative benefits was a substantial enhancement of survivor benefits. CRR Report, at 26. The Commission also contemplated that the temporary benefit increases would "become permanent" under the restructured system. CRR Report, at 23.

fits, the Congress scheduled that increase to expire also on June 30, 1973 and expressly stated "the policy of the Congress" that the three temporary increases "can be made permanent only if at the same time a method is adopted to insure the receipt of sufficient revenues by the Railroad Retirement Account to make such Account financially solvent based on sound actuarial projections" (86 Stat. 765, 767); and the Congress called upon "representatives of employees and retirees and representatives of carriers" to submit a report, not later than March 1, 1973, of their recommendations in that regard, after "taking into account" the Commission's recommendations. And in a 1973 statute, the Congress extended the expiration date of the three temporary increases to December 31, 1974, and provided for the formal establishment of a joint labor-management railroad retirement negotiating committee to submit, not later than April 1, 1974, "their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system," which recommendations "shall take into account the specific recommendations" of the Commission "and shall be specific and shall be presented in the form of a draft bill" (87 Stat. 162, 165).

C. The Enactment of the Railroad Retirement Act of 1974 and Its Solution of the Windfall Dual Benefit Problem.

(1) The Joint Labor-Management Railroad Retirement Negotiating Committee (hereinafter the "Joint Committee") reached an agreement upon the principles to be embodied in a draft bill, and so advised the Congress in an April 10, 1974 letter which outlined those principles in considerable detail.[21] A bill embodying those principles

[21] An identical letter was addressed to the Chairmen of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Labor and Public Welfare. It was published in the

subsequently was drafted and submitted to the Congress where it was introduced as H.R. 15301 and S. 3612. After lengthy hearings before committees of both Houses,[22] those committees issued detailed reports (see n. 16, p. 13, *supra*) recommending adoption of the bill with some changes, and it was enacted in October of 1974 by virtually unanimous votes overriding a presidential veto.[23] While many of the features of the 1937 Act were retained (including generally the types of benefits provided and the eligibility requirements therefor), the legislation did restructure the railroad retirement system in a manner which the congressional committees concluded would place the system "on a sound financial basis." [24] Among other things, the legislation adopted a two-tier system in substance, although not in the form recommended by the Commission on Railroad Retirement,[25] and by that and other means to be discussed resolved the windfall dual benefit problem.

Congressional Record for June 10, 1974, 120 Cong. Rec. 18391, and was included in committee prints of background information. *Background Information Relating to Proposed Changes in the Railroad Retirement System*, House Committee Print No. 24, 93d Cong., 2d Sess. (June 10, 1974), at 7-18; *Proposed Changes in the Railroad Retirement System, 1974, Background Material, Draft Legislation, and Recommendations Pursuant to Public Law 93-69*, Unnumbered Senate Committee Print, 93d Cong., 2d Sess. (August 1974), at 7-18.

[22] Hearings on H.R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (July 25, 30, 31, and August 1, 1974), hereinafter the "House Hearings." Hearings on S. 3612 before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (September 5 and 10, 1974), hereinafter the "Senate Hearings."

[23] See 120 Cong. Rec. 35616, 35898. Title I constitutes the 1974 Act. Title II includes transitional provisions applicable to beneficiaries who retired prior to January 1, 1975, and the remaining titles involve conforming amendments of other statutes and effective dates (generally January 1, 1975).

[24] See, *e.g.*, Committee Reports, at 1, 14, 17-18.

[25] See, *e.g.*, Committee Reports, at 18-19. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad employment, while the second

(2) That was done in the context of a situation where, if "the existing system [was] permitted to continue, the Railroad Retirement system [would] be bankrupt by 1981, and there [would] be insufficient funds available to pay benefits at the present level to anyone—past, present or future beneficiaries." Committee Reports, at 7. The Congress recognized, as did the Joint Committee (120 Cong. Rec. 18391), that "[r]esolution of the so-called 'dual benefit' problem is central both to insuring the fiscal soundness of the railroad retirement system and to establishing equitable retirement benefits for all railroad employees." Committee Reports, at 11. The "fundamental step" toward resolution of the problem was the establishment of the two-tier system under which "a 'windfall' no longer will be possible except insofar as the bill expressly preserves benefits for those beneficiaries

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tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to prevent duplication. The 1974 Act also adopted a new benefit formula for the second tier which, as the Commission had recommended, had the effect of eliminating the "compounding" problem and of making permanent the three temporary increases in benefit levels (see n.20, p. 15, *supra*) amounting to "about 52% on a cumulative basis" (Committee Reports, at 19-20); and it enhanced the level of survivor benefits (in general, from 110% to 130% of the social security level) for both existing and future beneficiaries, as recommended by the Commission, and broadened an early-retirement provision adopted in 1973 (*id.*, at 17, 18). Under the 1973 amendment to the 1937 Act, an employee with 30 or more years of railroad service could retire at age 60, but he was not eligible for a supplemental annuity and his spouse was not eligible for a spouse annuity until he was 65. Since those limitations had proven to be a "significant deterrent" to effectuation of the purpose of the 1973 amendment to encourage early retirement by long-service railroad employees, the Joint Committee recommended (see, *e.g.*, 120 Cong. Rec. 18392-18393) and the 1974 Act contains provisions under which a supplemental annuity also is payable to such an early retiree (§ 2(b)(1)(i), 45 U.S.C. § 231a(b)(1)(i)), and a spouse annuity may be paid to his spouse (§ 2(c)(1)(i), 45 U.S.C. § 231a(c)(1)(i)).

and employees whose equities entitles them thereto." *Ibid.* The "most difficult problem" was the "manner in which dual benefits should be phased out on an equitable basis." *Ibid.*

The Committee Reports (at pp. 11-12) carefully described the 1974 Act's solution of that "most difficult problem" as follows:

> "First, the dual benefits of beneficiaries on the rolls as of January 1, 1975 would continue to be paid in full. However, the [windfall] portion of those dual benefits . . . would not be subject to future increases in the level of social security benefits. In effect, therefore, the amount of that portion will be frozen as of December 1, 1974. This is the approach recommended by the Commission on Railroad Retirement.
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> "Second, employees without sufficient railroad and non-railroad service and compensation by December 31, 1974 to have fully qualified under both systems would not be entitled to a [windfall] dual benefit. . . . In addition, however, such an employee upon retirement (or his survivors if he should die before retirement) would be entitled to a lump-sum refund of employment taxes paid under the Railroad Retirement and Social Security Acts prior to January 1, 1975 in excess of what would have been paid if all of his employment prior to that date had come under the Railroad Retirement Act. Again, this is what the Commission on Railroad Retirement recommended.
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> "Third, employees who have sufficient service and compensation to be fully qualified under both systems but who have not retired prior to January 1, 1975 would be divided into two classes or groups.
>
> "The first group would be comprised of those employees with a 'current connection' with the railroad industry—12 months of railroad service out of the

previous 30 months, as defined in the 1937 Act and in the bill—either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service [as of January 1, 1975] even though without such a 'current connection.' This group also would receive, upon retirement, a [windfall] dual benefit based upon service and compensation prior to January 1, 1975. The amount thus determined . . . would be subject to increase prior to retirement by reason of cost-of-living increases in the level of social security benefits during that intervening period, but would be frozen upon retirement, as would be the case of dual beneficiaries retired as of December 31, 1974.

"The second group would be composed of employees who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection to the railroad industry. Under the bill, they would not receive a [windfall] dual benefit upon retirement, unless they also had fully qualified under Social Security by the close of the year prior to 1975 in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid). If they had so qualified under both systems at that point, however, they would receive [windfall] dual benefits, upon retirement, calculated as of the time they left railroad service, and subject to cost-of-living increases in the level of social security benefits after 1974 and prior to retirement. The excess benefit would be frozen upon retirement, as in the case of other dual beneficiaries.

"The bill also contains generally similar provisions for terminating or phasing out [windfall] dual benefits of spouses and survivors of railroad employees."

In its April 10, 1974 letter to the Congress, the Joint Committee similarly outlined its recommended solution

of how windfall dual benefits should be phased out (which recommendation was approved by the congressional committees and enacted by the Congress) as between the same three classes of employees, the third of which was divided into two groups. 120 Cong. Rec. 18391-18392. The Joint Committee also informed the Congress, in that letter, that the recommended solution in regard to that third class "differ[ed] from the Commission's" in thus dividing it into two groups; and that while the first such group was believed to be "entitled to be in the same situation" as persons who had retired as of the changeover date, the second group "have a less strong equitable claim than those who have remained with the industry" so that they should receive a preserved windfall benefit, upon retirement, only if they had qualified under both systems as of the end of the year in which they left railroad service. 120 Cong. Rec. 18392.[26]

(3) That solution is, of course, reflected in the bill enacted in 1974. With respect to employees in the first classification—those who retired prior to the changeover date—any windfall amount as of that date is preserved by §§ 204(a)(3) and (4).[27] With respect to employees

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[26] The Section-by-Section Analysis of the Bill, contained in the Committee Reports, includes even more detailed explanations of the windfall provisions (pp. 38-39, 42-43 (or 43-44), 44 (or 45), 47-48, 59, 60 (or 61)). The three classifications established in that regard, including the division of the third classification into two groups, also were explained in the testimony of William H. Dempsey (House Hearings, at 167-169; Senate Hearings, at 340-345) and of C. L. Dennis (House Hearings, at 221; Senate Hearings, at 293). Mr. Dempsey, who was then Chairman of the National Railway Labor Conference, was the chairman of the management members of the Joint Committee. Mr. Dennis, who was then President of the Brotherhood of Railway and Airline Clerks, was the chairman of the labor members of the Joint Committee and was one of the members of the Commission on Railroad Retirement.

[27] 88 Stat. 1353. The transition provisions in Title II of the bill are not included in the U. S. Code. Any windfall amount of spouses and survivors on the beneficiary rolls as of January 1, 1975 are

in the second classification—unretired employees who had not qualified under both systems as of the changeover date—no provision preserves a windfall amount, so that none is payable upon retirement to such persons, their spouses or survivors. With respect to employees in the third classification—unretired employees who had qualified under both systems as of the changeover date—the further division of that class into two groups is reflected in § 3(h), 45 U.S.C. § 231b(h). Under §§ 3(h)(1) and (3), any windfall amount as of the changeover date is preserved for such employees if they had railroad service in 1974 or 25 or more years of railroad service by that date or a current connection either as of that date or when they retired; and under §§ 3(h)(2) and (4), for such employees that do not meet any of those three requirements but were qualified under both systems by the end of the year they left railroad service, any windfall amount as of the end of that year is preserved.[28] The lump-sum payment refunding excess taxes to employees who do not have a windfall amount preserved is provided under § 5(d), 45 U.S.C. § 231e(d).

One of the three circumstances which, under §§ 3(h)(1) and (3), entitles an unretired employee, upon retirement, to a preserved windfall amount as of the changeover date—some railroad service in 1974—essentially is redundant.[29] Thus, the Congress fundamentally

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preserved by §§ 206(3) and 207(3), 88 Stat. 1355, 1356. All such preserved windfall amounts are excluded from future cost-of-living increases, equivalent to those afforded by social security, provided under § 209(a), 88 Stat. 1357.

[28] The preserved windfall amounts are increased by percentages equivalent to cost-of-living increases in social security benefits, between January 1, 1975 and the date of retirement, under § 3(h)(5). Similar provisions in regard to the spouses and survivors of such employees are contained in §§ 4(e) and 4(h), 45 U.S.C. §§ 231c(e) and (h).

[29] An employee who left railroad employment after some service in 1974 would be entitled to precisely the same preserved windfall amount under §§ 3(h)(2) and (4), since under those provisions

distinguished between the two groups in the third classification on the basis of whether they had either 25 or more years of railroad service or a current connection with the railroad industry as of the changeover date or upon retirement. Both the long-term railroad service reflected in the 25-year provision and the continued attachment to the railroad industry reflected in a current connection are circumstances that the Congress historically has regarded as justifying favored treatment under the railroad retirement system, as is shown by numerous provisions of the 1937 Act which generally also were carried over into the 1974 Act. See pp. 4-10, *supra.*

The Congress also provided, in § 15(d) of the 1974 Act, 45 U.S.C. § 231n(d), for appropriations out of the General Treasury over a 25-year period of amounts sufficient to pay the future costs of the windfall benefits thus preserved, as offset by additional interest earned by the Railroad Retirement Account by reason of a change in investment policies provided in § 15(e) of that Act, 45 U.S.C. § 231n(e). In general, the Congress concluded that it primarily was at fault in permitting the windfall dual benefit problem to arise, and that it would be inequitable to require the railroads, who received no advantage from the social security employment that gave rise to the windfalls, or the employees, who would be debarred from future accruals of windfalls, to bear

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he had until the end of the year in which he left railroad service to qualify under both systems and the preserved windfall amount is calculated as of the end of such year. And, of course, if he continued in railroad service through 1974, such an employee would have a current connection as of January 1, 1975. This redundancy explains why the circumstance of some railroad service in 1974 was not mentioned in the summary of the windfall provisions in the Committee Reports, quoted on pp. 19-20, *supra*, or in the April 10, 1974 letter. That circumstance, as well as the others, was specifically mentioned in the section-by-section analyses (Committee Reports, at 38-39).

those phaseout costs through future payments of employment taxes. See, *e.g.*, Committee Reports, at 2-7.

D. The Decision Below.

(1) The District Court conceded that this case "does not involve the deprivation of a fundamental right or . . . discrimination against a suspect class," so that the claimed deprivation of equal protection of the laws in violation of the due process clause of the Fifth Amendment must be judged by the "rational basis test." C. 5-7, J.S. App. 28a. But the District Court also concluded that there was no rational basis for the denial in the 1974 Act of a preserved windfall dual benefit to what that court characterized as the "Plaintiff Class."

The "Plaintiff Class" was said to consist of persons with between 10 and 25 years of railroad service as of December 31, 1974 who were qualified or "vested" as of that date under both the railroad retirement and social security systems, but who neither had a current connection with the railroad industry as of that date nor worked for the railroad industry in 1974. It was contrasted by the trial court with a class or group of persons who had the attributes of the "Plaintiff Class" and also either had a current connection as of December 31, 1974 or who had worked for the railroad industry in 1974. C. 2, J.S. App. 27a. The distinction made by the Congress between that class and the "Plaintiff Class" was said to be based solely upon whether or not the individual concerned was "active" with the railroads in 1974. C. 4, J.S. App. 27a-28a. In addition to ignoring completely the first two classes distinguished by the Congress,[30] the "Plaintiff Class" thus distinguished by the lower court

[30] *I.e.*, (1) those persons who had retired prior to January 1, 1975 and (2) those unretired persons who were not qualified under both systems prior to January 1, 1975. See pp. 21-22, *supra*.

does not accurately reflect the manner in which the Congress divided its third class into two groups.[31]

In any event, the District Court concluded that the "rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact;" that the purposes of the 1974 Act "were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons" who were qualified or "vested" under both systems as of December 31, 1974; and that the discrimination against the "Plaintiff Class" is "not rationally related" to either purpose. C. 8, 9 and 19, J.S. App. 28a, 30a. The District Court attempted to buttress the latter conclusion by conclusions regarding other "factors bearing adversely on the rationality of a statutory discrimination between similar situated persons" (J.S. App. 30a). In its opinion, other methods of resolving the "financial difficulties" of the railroad retirement system were available and preferable (C. 14, J.S. App. 29a); there was "reasonable reliance of the Plaintiff Class" on receiving a windfall benefit upon retirement (C. 15, J.S. App. 29a-30a); the union representatives on the Joint Committee breached a "duty of fair representation owed plaintiff's class" which "was sanctioned by Congress" in enacting the 1974 Act (C. 16, J.S. App. 30a); and the "Congress was unaware" that the 1974 Act "adversely affected the Plaintiff Class" (C. 17 and 18, J.S. App. 30a).

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[31] The basic distinction made by the Congress in regard to unretired persons who had qualified under both systems prior to January 1, 1975 was not between those who were "active" in 1974, in the sense of having had railroad service in that year or a current connection at the end of that year, and those who were not so "active," but between those who either had 25 or more years of railroad service as of the end of that year or a current connection either as of the end of that year or when they retired and those who neither had such long-term railroad service nor such a current connection with the railroad industry. See pp. 22-23, *supra*.

(2) We will demonstrate the legal defects in or irrelevancy of those conclusions in our Argument. This appears to be the most appropriate place, however, to comment upon the factual errors underlying certain of those conclusions which, together with related findings, cast completely unwarranted aspersions upon representatives of the railroads and the unions who participated in the proceedings of the Joint Committee.[32]

With all due respect to the District Court, its conclusions to the effect that a purpose of the 1974 Act was "to protect completely" the rights to a windfall benefit of all persons who were qualified or "vested" under both systems as of December 31, 1974, and that the "Congress was unaware" that the "Plaintiff Class" would be denied a preserved windfall benefit, are nonsensical. Those conclusions are contradicted not only by the language of the bill which the Congress enacted, but also by the committee reports which explained what was being done in detail, including identification of the classes of persons affected and the circumstances in which they would and would not be entitled to a preserved windfall amount, together with an explanation of the nature and extent of that benefit when preserved. That was done not only in the general discussion of the bill's solution of the windfall dual benefit problem quoted at pp. 19-20, *supra*, but also in the section-by-section analyses of the provisions of the bill (see n. 26, p. 21, *supra*). To be sure, those reports contain general statements which in themselves do not spell out all of the distinctions made in the legis-

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[32] In addition, we note that the lower court's rulings to the effect that the discrimination against the group that includes the "Plaintiff Class" is not rationally related to the purpose of the Congress to place the railroad retirement system on an actuarially sound financial basis is erroneous factually, as well as legally, as it ignores the conclusion of the Congress that terminating windfall dual benefits was "central" to the achievement of that purpose. See pp. 18-19, *supra*.

lation, such as those quoted in F. 63-65 (J.S. App. 22a-24a), but that common occurrence does not in any way detract from the fact that the specific discussions of the windfall provisions demonstrate that the Congress both knew and intended exactly what the 1974 Act provides in that regard and that the group which includes the "Plaintiff Class" therefore would be adversely affected by those provisions.

The related finding of the trial court to the effect that members of the Joint Committee, and particularly Mr. Dempsey, misled the Congress in testimony on the recommended bill to "believe that the plaintiff class was protected by the" 1974 Act (F. 52, J.S. App. 15a) is a complete distortion of the legislative record, even apart from the fact that the Congress obviously was not so misled.

The language of § 3(h) of the bill before the Congress, which the Joint Committee had drafted at the direction of the Congress, itself made abundantly clear that the members of the group that included the "plaintiff class" would not be entitled to a preserved windfall benefit unless they had qualified under both systems by the end of the year in which they left railroad service. That was also made clear in the April 10, 1974 letter from the Joint Committee to the Congress, which was printed in the Congressional Record and also made available by the congressional committees as part of the background information to be considered by their members and other congressmen in passing upon the bill. See n. 21, p. 16, *supra*. It was again made clear in the written statement submitted by Mr. Dempsey to the congressional committees as a part of his testimony, as is revealed by the partial quotation from that statement in Finding 53, J.S. App. 17a-19a.

The lower court attempted to denigrate that statement by asserting that it "euphemistically refers to the dis-

crimination against the plaintiff class as a 'refinement' " and "inaccurately defines the persons whose vested interests were protected since it fails to disclose that persons who worked for the railroads even one day in calendar year also received their full benefits." J.S. App. 19a. Whether or not "euphemistic," the "refinement" was "upon the recommendations of the Commission on Railroad Retirement" and was believed by the Joint Committee "to be desirable in order to reflect more accurately the comparative equities of the two groups." J.S. App. 18a. More importantly for present purposes, that reference did not in any way obscure the disclosure by Mr. Dempsey that the group which includes the "plaintiff class" would not be entitled to a preserved windfall except as they had qualified under both systems at the end of the year in which they left railroad service. That is also true of the alleged inaccuracy, which in any event simply involved a failure to mention a redundancy (see n. 29, p. 22, *supra*) and did not affect any member of the "plaintiff class."

The lower court also asserted that the explanation in Mr. Dempsey's written statement "was refuted by the oral testimony" set out in Finding 52. J.S. App. 17a-18a. Rather than "refuting" his written statement in his oral testimony, Mr. Dempsey explained that it was lengthy and "very detailed," so that instead of entrenching on the committees' time by reading the statement, which in any event "the members of the committee and the staff can do . . . much better" for themselves, he would focus his oral testimony on a more generalized discussion of what he regarded as the main or key issues. House Hearings, at 181; Senate Hearings, at 308. And, in fact, none of the excerpts in Finding 52 (J.S. App. 15a-17a) from Mr. Dempsey's testimony purported to give a de-

tailed explanation of the manner in which windfall benefits would be phased out.[33]

The lower court's conclusion, and related findings, to the effect that the unions breached their duty of fair representation to the "plaintiff class" and thus would have violated the law, if such breach had not been sanctioned by the Congress in enacting the 1974 Act, is equally fallacious. Even if the duty of fair representation had been applicable, which it was not,[34] it would not have been breached.

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[33] The colloquy between Mr. Dempsey and Representative Dingell did not relate to windfall benefits, but was part of Mr. Dempsey's discussion of the new benefit formula for Tier II (see n.25, p. 17, *supra*). Mr. Dempsey was explaining why that new formula would reduce the actuarial deficit, even though it would result in benefits as large or larger than those currently being paid under the 1937 Act—primarily because of its elimination for the future of the "compounding" problem which the Commission on Railroad Retirement had pointed out (see n.20, p. 15, *supra*). See House Hearings, at 199; generally, at 197-205. The next excerpt is simply a generalized statement made by Mr. Dempsey in the course of explaining his views as to the manner in which the costs of phasing out windfall benefits should be funded (*see id.*, at 209-216), and Mr. Dempsey's colloquy with Senator Hathaway, as is apparent on its face, sets forth Mr. Dempsey's reasons for objecting to the Senator's suggestion that the number of qualifying years be increased. Of course, the number of qualifying years required by existing law was utilized in the 1974 Act with regard to the group that includes the "Plaintiff Class" as well as with regard to the other classes or groups affected, and adoption by the Congress of the Senator's suggestion would have reduced the number of persons entitled to a preserved windfall amount both as to that group and generally.

[34] That duty is imposed by the Railway Labor Act and the National Labor Relations Act upon the "exclusive bargaining representative of the employees" in a bargaining unit with respect to the representation of those employees in collective bargaining and in enforcing bargaining agreements. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). The Joint Committee was not established pursuant to either of those Acts. Even if it had been, the union members would not have represented persons outside of the bargaining unit, such as former railroad employees including the members of the "Plaintiff Class." *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 171-175 (1977).

The asserted breach was an alleged agreement by the union representatives "during the critical negotiations to deprive the plaintiff class of their 'vested benefits' in exchange for liberalized benefits for others" (C. 16, J.S. App. 30a). Those "liberalized benefits" are the increase in the level of survivor benefits, as recommended by the Commission on Railroad Retirement, and the broadening of an early retirement provision to make it more effectual. See F. 40, J.S. App. 11a-12a, and n. 25, p. 17, *supra*. The members of the "plaintiff class" (or their survivors) are not excluded from qualifying for such liberalized benefits and, as Mr. Dempsey made clear to the Congress, "they are either right or wrong on their own merits" and should be so judged by the Congress and not "confuse[d] in some way . . . with the phase-out dual benefit question." Senate Hearings, at 318; generally, at 317-318. And even if there had been a tradeoff in that regard, that would be permissible under the duty of fair representation.[35]

The Joint Committee, including its union members, was faced with a very difficult problem. Temporary general increases amounting to a cumulative 52% in existing benefit levels would expire at the end of 1974 unless new legislation was enacted, and there were predictions that the entire railroad retirement system would be bankrupt by 1981 unless something were done. In reaching agreement on proposed legislation that remedied those problems, the union greatly benefitted the members

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[35] A union does not violate the duty of fair representation by "taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). "The complete satisfaction of all who are represented is hardly to be expected" and a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

of the "plaintiff class" as well as other retirees and potential retirees. The increased survivor benefits apply to all eligible survivors, including those already on the beneficiary rolls, and thus advantage the survivors of the members of the "plaintiff class" as well as others. In phasing out windfall dual benefits, the class most advantaged—those who retired prior to January 1, 1975—were no longer members of the unions, while the class most disadvantaged—unretired employees who had not qualified under both systems—made up the generality of the unions' current membership, so that factor obviously had nothing to do with the recommended legislation. And, the group which included the "plaintiff class," even though they had left railroad service, were given a preserved windfall if they had qualified under both systems by the end of the year they left such service and in any event if they returned to railroad service thereafter so as to have a current connection when they retire. And, if not entitled to a preserved windfall, they are entitled to a refund of excess employment taxes paid.

In short, the unions, like the carriers, made a good faith effort to accommodate the various interests involved so as to reach a reasonable settlement of an extremely difficult and complex problem. Whether or not that was the best of all possible settlements, it is highly unfair to characterize those efforts as a breach of the duty of fair representation. Such a characterization, if allowed to stand, can only make more difficult future efforts by the carriers and unions to resolve railroad retirement and other issues through compromise agreements which by their very nature cannot possibly fully satisfy the desires of everyone affected.

ARGUMENT

The Government has demonstrated in the Jurisdictional Statement that the Court has jurisdiction of this appeal and that the decision below gives rise to a substantial constitutional issue which should be reviewed by the Court. In this *amicus* brief, we shall elaborate upon and emphasize the Government's suggestion (J.S. at 24) that the "Court may wish to consider summary reversal." We believe that the decision below is so erroneous and the constitutionality of the provisions of the 1974 Act in question is so plain, under constitutional principles firmly established by this Court, that a summary reversal is the most appropriate disposition of the case, thereby enabling the Court to conserve its time for use in cases involving more doubtful issues.

1. "Like Social Security . . ., railroad retirement benefits are not contractual," so the "Congress may alter, and even eliminate, them at any time" without violating the Constitution. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). We assume that it is also true of railroad retirement, as it is of social security, that the Congress may not "exercise its power to modify the statutory scheme free of all constitutional restraint," in that the equal protection of the laws protected by the Due Process Clause of the Fifth Amendment must be afforded; but the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). See also, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971).[36]

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[36] Both *Salfi* and *Belcher* point out, among other things, that a Federal statute "is perforce consistent with the due process requirement of the Fifth Amendment" if it would satisfy the standards applicable to the States under the Equal Protection Clause of the Fourteenth Amendment. See 422 U.S., at 770; 404 U.S., at 81.

2. The District Court was obviously correct in holding that this case "does not involve the deprivation of a fundamental right . . . or discrimination against a suspect class." See p. 24, *supra*. Hence, the statutory classification adopted by the Congress in the 1974 Act does not violate equal protection unless the "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). In determining whether such a rational basis exists, it is necessary to begin "with the statutory classification itself," *Califano* v. *Boles*, —— U.S. ——, 47 U.S.L.W. 4874, 4877 (1979), and the "broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *California* v. *Jobst*, 434 U.S. 47, 55 (1977).[37]

The rationality of the statutory classification at issue here is plain when considered in the light of the background and history of the 1974 Act which we have set forth in our Statement of the Case. Very generally, the Congress was faced with the prospect that the railroad retirement system would be bankrupt within a few years, and thus unable to pay benefits to anyone, unless something was done to restructure the system on a sound financial basis. It concluded that the principal cause of the system's financial difficulties, and the key to solving that problem as well as to providing a more equitable system of benefits, was the windfall dual benefit situation. Such windfall benefits not only were inequit-

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Hence, in our further discussion, we rely upon decisions by this Court under the Fourteenth, as well as those under the Fifth, Amendment.

[37] Hence, the District Court erred in focusing upon a "Plaintiff Class" that differed in characteristics from the statutory classification adopted by the Congress. See pp. 24-25, *supra*.

able in themselves, but their cost was borne entirely by the railroad retirement fund even though they resulted from employment covered by the social security system. See pp. 11-13, 18, *supra.*

Thus, it unquestionably was proper for the Congress to enact legislation for the purpose of restoring and protecting the financial integrity of the railroad retirement system which it established,[38] and to restructure that system so as to coordinate it with the social security system—which the Congress also had established—in a manner that would remedy the windfall dual benefit problem. See, *e.g.*, *Richardson* v. *Belcher*, *supra* at 82-84. That could have been done by terminating windfall benefits altogether (see p. 32, *supra*), but a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976). In that case, the Court upheld a "grandfather provision" in an ordinance terminating the sale of foodstuffs by pushcart vendors, which excepted those vendors that had engaged in that business for eight or more years. In so doing, the Court concluded that the "city would reasonably decide that newer businesses were less likely to have built up substantial reliance interest in continued operation," and for that reason, among others, the "grandfather provision" did not "so lack rationality" as to "constitute a constitutionally impermissible denial of equal protection." *Ibid.*

The determinations by the Congress as to what classes should in effect be "grandfathered" in regard to windfall dual benefits are as much or more reasonable and rational. It certainly is rational to believe that the "reliance interest" and other equities in regard to a windfall dual benefit are more substantial on the part of those who have demonstrated their attachment to and

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[38] See, *e.g.*, *Califano* v. *Boles*, *supra* at 4878; *Matthews* v. *Diaz*, 426 U.S. 67, 83 (1976); *Weinberger* v. *Salfi*, *supra* at 780.

dependence on the railroad industry by 25 or more years of service or a current connection with that industry, than on the part of those employed by the railroads for a lesser period of time who left railroad service sufficiently in advance of enactment of the 1974 Act as not to have a current connection on the changeover date and did not return to that industry so as to have a current connection when they retire.

This is particularly so since both long-term railroad service and the existence of a "current connection" (or the related concept of an "employment relation") traditionally have been factors which the Congress has considered to justify more favorable treatment under the railroad retirement system. See pp. 4-10, 22-23, *supra*, and compare *Matthews* v. *Diaz*, *supra* at 78 n. 1 and accompanying text, and *Weinberger* v. *Salfi*, *supra* at 777-780. It hardly could be otherwise under a system which from the beginning has primarily been intended to provide "benefits for persons who pursue careers in the railroad industry," so as, among other things, to "encourage older workers to retire" from the industry and thus " 'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, *supra* at 573-574. Preservation of a windfall benefit for persons, such as the members of the "Plaintiff Class," who already had permanently left railroad service and who did not return to that service before retirement would not further that purpose. And it has continued to be true, as it was when the *Alton* case was decided in 1935, that many of the persons who permanently leave railroad service before retirement do so because they were discharged for cause or preferred employment with some other industry, and thus have no substantial equitable claim to railroad retirement benefits. See pp. 7-8, *supra*.

3. It "is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,"

Fleming v. *Nestor*, *supra* at 611, as "[l]egislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them," *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971). See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).[39] And, for that matter, the legislative history demonstrates that the Congress did in fact base its classification upon its assessment of the relative equities of the various classes involved. See pp. 18-21, *supra*.

It is equally irrelevant whether the lines drawn by the Congress were the most reasonable or perfect that could have been drawn. "Even if the classification involved here is to some extent underinclusive and overinclusive, and hence the line drawn by Congress is imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance* v. *Bradley*, *supra* at 108. This Court has "repeatedly stated that there is no constitutional requirement that 'a statutory provision filter[] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.'" *Califano* v. *Boles*, *supra* at 4877. The existence of other alternatives is "irrelevant to the equal protection analysis," *Vance* v. *Bradley*, *supra* at 103 n. 20, even if such an alternative could be said to be "constitutionally preferable." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 73 (1978).[40]

And, it is irrelevant whether the "line drawn by Congress is longer than necessary to protect the fiscal in-

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[39] Hence, the District Court erred in holding that "the rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact." See p. 25, *supra*.

[40] Hence, the District Court's reliance on its conclusion that other means of resolving the financial difficulties of the railroad retirement fund were available and preferable (see p. 25, *supra*) was improper.

tegrity of the program," and that "unnecessary hardship is incurred by persons just short of qualifying." *Matthews* v. *Diaz*, *supra* at 83. "[A]ny line must produce some harsh and apparently arbitrary consequences," and the "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the difference between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, [the Court is] especially reluctant to question the exercise of congressional judgment." *Id.*, at 83-84.[41]

In the *Diaz* case, the Court upheld the constitutionality of a statute in which the Congress, in order to protect the financial integrity of the medicare program, disqualified from eligibility for medicare benefits all aliens who had not both been admitted for permanent residence in the United States and a continuous resident of the United States for five or more years. That was not irrational since "those who qualify under the test Congress has chosen may reasonably be assumed to have a greater affinity with the United States than those who do not," so that "[i]n short, citizens and those who are most like citizens qualify," while "[t]hose who are less like citizens do not." *Id.*, at 83. In this case, those who qualify for a preserved windfall benefit "may reasonably be assumed to have a greater affinity with the [railroad industry] than those who do not," so that, in short, career railroad employees and "those who are most like" career railroad employees qualify, while those "who are less like" career railroad employees do not. That dis-

[41] Hence, the District Court erred in giving weight to its conclusion that members of the "Plaintiff Class" reasonably relied upon receiving a windfall benefit (see p. 25, *supra*), and its findings concerning the injury to the "Plaintiff Class" (J.S. App. 24a-26a) are irrelevant.

tinction, like the distinction made in *Diaz*, obviously is not irrational in the context of a statute primarily intended to provide "benefits for persons who pursue careers in the railroad industry."

4. We have noted in connection with the above discussion a number of errors in the lower court's equal protection analysis. See ns. 37, 39-41, pp. 33, 36-37, *supra*, and accompanying text. It is perhaps worthwhile to mention separately, however, what we regard as the most fundamental error made by the District Court in that regard. That is its conclusions to the effect that a purpose of the Congress in the 1974 Act was "to protect completely" the rights of all persons who had qualified under both the railroad retirement and social security systems as of December 31, 1974, and that the "Congress was unaware" that the Act "adversely affected the Plaintiff Class." See p. 25, *supra*.

We have shown that those conclusions, and the related findings concerning a purported misleading of the Congress by members of the Joint Committee, are contrary to fact.[42] The legislative history, as well as the language, of the 1974 Act make entirely clear that the Congress knew exactly what it was doing in regard to windfall dual benefits including the fact that such a benefit would not be preserved for the group that included the "Plaintiff Class" except insofar as they had qualified under both systems by the end of the year in which they left

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[42] We have also shown that the purported breach by the union representatives on the Joint Committee of their duty of fair representation is without basis in fact or law. See pp. 29-31, *supra*. But even if such a breach had occurred or the Joint Committee had sought to mislead the Congress, that would be irrelevant. This Court established long ago, in an opinion by Chief Justice Marshall, that "a legislative act, which the legislature might constitutionally pass" will not be invalidated "in consequence of the impure motives," including even corruption, of either those who sought the legislation or of "members of the legislature which passed the law." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

railroad service. See pp. 26-29, *supra*. We note, however, that since there is a rational basis for the distinctions made by the statute, it would not make any difference if the Congress had been unaware of its effect upon the "Plaintiff Class." *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 87-89 (1977).

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, we urge the Court to note jurisdiction of the appeal and summarily reverse the decision below. If that decision is not summarily reversed, the case should be set down for full briefing and argument.

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No. 79-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
Appellant,

v.

GERHARD H. FRITZ,
Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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MOTION OF THE RAILWAY EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of this Court, the Railway Labor Executives' Association hereby moves the Court for leave to file the attached *amicus* brief in support of the Jurisdictional Statement filed herein by the Solicitor General.

Railway Labor Executives' Association is an association of all of the standard and international railway labor organizations, 21 in number, which collectively

represent all of the crafts and classes of all employees who work on the nation's Class I railroads. Among the functions for which the Railway Labor Executives' Association is responsible is that of representing the interests and concerns of all railroad employees in maintaining and preserving retirement benefits available to them, their spouses or survivors under the Railway Retirement Act. The members of the Railway Retirement Committee of the Railway Labor Executives' Association served as labor members of the Joint Labor-Management Railroad Retirement Negotiating Committee established pursuant to Section 107 of PL 93-69 in an effort to reach agreement on a legislative program to avert the then impending financial collapse of the Railroad Retirement system. In time, an agreement was reached resulting in the preparation of a draft bill, prepared at the direction of the Congress, which eventually was submitted to the respective chairmen of the Committees of the United States Congress having jurisdiction over the railroad retirement program.

The Railroad Retirement Act provides the basic pension for railroad employees. The ability of the program to meet its pension obligations as they become due is of overriding importance to railroad employees, most of whom spend their entire working lives in railroad employment. The railroad industry is unique in this respect. With minor exceptions affecting an insignificant percentage of railroad employees, there are no negotiated supplemental pension plans in the railroad industry. The Railroad Retirement Act supplies the basic and in most cases, the only retirement program for these employees.

The decision under review, if sustained, would upset a balance established by the Congress in the 1974 legislation restructuring the Railroad Retirement Act, which was designed to eliminate a financial drain of such magnitude on the resources of the railroad account that it threatened to undermine the entire system.

We submit this brief as a supplement to the Jurisdictional Statement to assist the Court in its understanding of the complex problems presented to the Congress in the shaping of the railroad retirement legislation under review, resulting, among other things, in the drawing of lines which the decision below would redesign.

The date of filing this motion for leave to file the attached *amicus* brief has been unduly delayed because of the need to confer with the client and because of the intervening holiday period.

For these reasons, we request the Court to permit the filing of the attached *amicus* brief.

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BRIEF FOR THE RAILWAY EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

This amicus brief is submitted to the Court pursuant to Rule 42.

INTEREST OF AMICUS CURIAE

The motion for leave to file this *amicus* brief describes the deep interest of the Railway Labor Executives' Association, as the association of all railway labor unions representing all classes and crafts of railway employees, in any matter, including this case

which affects the basic pension system for railroad employees.

As pointed out in the motion, the Railroad Retirement Committee of the Railway Labor Executives' Association served as the labor members of the Joint Labor- Management Railroad Retirement Negotiating Committee and was intimately involved in the design of the legislative proposals to restore the financial integrity of the railroad pension system. As fully described in the Jurisdictional Statement and as supplemented by this *amicus* brief, the threat to the continuing existence of the Railroad Retirement program was so severe during the period of this legislation that radical restructuring was essential if the system were to survive. In the course of the consideration of this legislation, the windfall or dual benefit, defined in the Jurisdictional Statement and in this brief, was identified as the central cause for the then impending financial collapse of the program. It was thus apparent to the members of the Joint Committee established by the Congress and to the Congress that the Railroad Retirement system could no longer tolerate the continuance of this unique element. The result was the elimination of the dual benefit, but in so doing the Congress prescribed a savings clause covering a class of railroad employees, fully described in the Jurisdictional Statement, with respect to whom the Congress identified a federal obligation. Financing of this vestigal element carried over from the preceeding system was to be undertaken by the Federal Treasury. It was in this area that lines had to be drawn and were drawn based upon long standing and traditional considerations applied by the Congress throughout decades of Railroad Retirement legislation. Although there may have

been options with respect to the manner of drawing lines of this nature, the distinctions made by the Congress in defining the "grandfathered" class were hardly irrational.

This brief will consider these points in amplification of the Jurisdictional Statement.

STATEMENT OF THE CASE

In *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979), Mr. Justice Blackmun characterized the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §§ 231-231t (1976 ed.), "[i]n its modern form," as comprising "both a private pension program and a social welfare program" providing two tiers of benefits reflecting this dichotomy. "The upper tier, [the Railroad Retirement or staff component] like a private pension, is tied to earnings and career service. . . . The lower, and larger, tier of benefits [the Social Security component] corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act," 45 U.S.C. § 231b(a)(1). *Hisquierdo* at 574.

The Court further noted in *Hisquierdo* that "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, or even eliminate, them at any time. (at 575.) It should be stressed, however, that the Railroad Retirement system is a closed system, historically supported through Railroad Retirement taxes paid by employees and by the railroads. Similarly, the cost of administration of the Railroad Retirement Board are supported exclusively by the railroad industry through the payment of railroad taxes so earmarked.

This case involves the treatment by Congress in 1974 of those hybrid or unique benefits called dual benefits resulting from the interplay of the Railroad Retirement Act and the Social Security Act, 42 U.S.C. §§ 301 *et seq.*; that is, from the employment of an employee in railroad work and non-railroad work either concurrently or alternatively in his employment history. Prior to 1974, a railroad employee could acquire Social Security credits through daily or weekly employment at the end of his hours or days of railroad employment, (a practice which has sometimes been referred to as "moonlighting.") or an employee could have accumulated quarters of Social Security coverage through non-related employment prior to or subsequent to his railroad employment. In either case, sufficient guarantees of coverage in his non-railroad employment together with sufficient years of service in his railroad employment would have and did result in satisfying eligibility requirements under each of these systems.

In these cases, the Social Security benefit plus the Social Security equivalent within the Railroad Retirement benefit will always exceed the amount of a Social Security benefit which would have been paid if based on combined railroad and non-railroad earnings. Stated in terms of the Railroad Retirement Act of 1974, the Social Security component of the Railroad Retirement benefit (Tier I) based on railroad earnings plus the Social Security benefit based on non-railroad earnings, calculated separately, will exceed the amount of the benefit which would have been payable if both the railroad and non-railroad service had been combined in a single Social Security calculation.

The windfall or excess dual benefit which is the subject of this proceeding, is the difference between these

two sums, that is, the amount by which the sum of the separate Social Security benefits, one based on railroad service only and one based on Social Security service only, exceeds the single benefit based on the combined railroad and social security service.

This windfall benefit was a consequence of the incompleteness of the coordination of the two systems in 1951 and during the decades prior to the challanged 1974 legislation had the unfortunate effect of draining the railroad account of approximately $4 billion.

In 1974, it was established that the actuarial deficit of the Railroad Retirement system had escalated to $529 million each year or 9.05% of the 1974 payroll. 451 million of these dollars or 7.72% payment were directly attributable to the windfall benefit. It was recognized by the Joint Committee and by the Congress that a shortfall of this enormous dimension, if untreated, would destroy the railroad pension system within a short period of time. The Committees in each Branch of the Congress agreed "that resolution of the so-called "dual" benefit is central both to insuring the fiscal soundness of the Railroad Retirement system and in establishing equitable retirement benefits for all railroad employees." H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974) at 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974) at 11 (hereinafter referred to as "Committee Reports" where the reports are substantially identical in substance or in pagination).

The Committee Reports recognized that "the most difficult problem in this regard involves the manner in which the dual benefit should be phased out on an equitable basis" and thereafter proceeded to define the

class "whose equities entitle them" to be included within the savings provision, Committee Reports at 11.

The Committee Reports explained that because the "deficit in the railroad retirement system has occurred" in consequence of Congressional action, improving Social Security benefits as well as action removing earlier restrictions on dual benefits, the bill, as reported, provided "that appropriations be made to cover the costs of phasing out dual benefits" as delineated by the savings provision; that is, that the cost of supporting the restricted dual benefit program, estimated on a level basis of $285 million through the year 2000 or $7 billion 1974 dollars, should be paid by the Federal Treasury and not by Railroad Retirement system which lacked the capacity to absorb this heavy burden. Committee Reports at 4 and 5.

It was on this precise point that President Ford rested his veto of the 1974 legislation. In his veto message of October 4, 1974, he stated that "This bill proposes to solve the financial problems of the Railroad Retirement system by placing a seven billion dollar burden on the general taxpayer, requiring him to contribute $285 million to the Railroad Retirement Trust Fund for the next 25 years." *Legislative History of the Retirement and the Railroad Unemployment Insurance Systems,* Railroad Retirement Board (1978) at page 470.

The House of Representatives overrode the veto by a vote of 360 to 12. The override vote in the Senate was 72 to 1. *Legislative History, Id.* at 472.

It was subsequently determined that the $285 million estimate of the cost of maintaining the phased out dual benefit within the limits of the savings provision

had been calculated on a static basis; that is, without allowance for inflation. Current recalculation on a level basis through the year 2000, adjusted for inflation, made by the Comptroller General of the United States establishes the dual benefit cost at $415 million per year over a 21 year period or approximately $8 billion. The redrawing of the line by the District Court would increase this figure by an amount of $119 million for each of the next 20 years or approximately a $2.4 billion increase overall. (JS 8, p. 15.)

Congress has yet to appropriate the full amount of this phase out cost as estimated by the Railroad Retirement Board pursuant to the provisions of the Act, a calculation which, in turn, is well below the Comptroller General's estimate.

THE DECISION BELOW

The Jurisdictional Statement clearly and succinctly analyzes the decision below. There is no warrant for further analysis on this point.

As pointed out by the Jurisdictional Statement, the District Court's decision turned on whether the lines drawn by the savings clause were reasonably related to the legislative purpose.

The District Court, in deciding that the delineation by the savings provision in Section 3(n) of the Railroad Retirement Act excluding the members of appellees' class from the grandfathered class had no reasonable relation to the purpose of the statute, (J.S. App. 30a) failed completely to perceive the nature and purpose of the restructured legislation as described in the Jurisdictional Statement and as highlighted by the *amicus* brief. Nothing could be clearer than the per-

ception by the Congress that the precipitous slide of the Railroad Retirement system into insolvency and eventual bankruptcy was due almost entirely to the growing weight of the dual benefit, resulting from the earlier amendments to the Social Security Act as well as the earlier repeal of the legislative restrictions on dual benefits.

As this Court noted in *Hisquierdo,* the obligation to pay dual benefits was and is not contractual but may be altered at any time, as it had been in the past, or even eliminated, as it was by the 1974 Act.

In abolishing dual benefits in 1974, the Committee of the Congress reported to their respective Bodies that "a windfall no longer will be possible except insofar as the bill preserves benefits for those beneficiaries or employees whose equities entitle them thereto." Committee Reports at 11. The Committee Reports then characterized the problem of structuring the grandfathered class "whose equities entitle them" to limited preservation as "most difficult." The reports thereupon proceeded to explain precisely how the lines were to be drawn.

It nowhere appeared that Congress was intent upon protecting "completely" the expectations of all persons, regardless of their attachment to the railroad industry, who were fully insured under Social Security and who had accumulated at some point in their working lives at least ten years of railroad service.

The contrary is the fact. The delineations and classifications were explicit and clear.

The problem of identifying financial resource other than Railroad Retirement for the support of the preserved dual benefit was obviously a most severe one,

witness the position of the Administration as reflected in President Ford's message on his veto of the bill, described above.

The delineation of the grandfathered class based upon attachment to the railroad industry so deliberately drawn by the Congress on the precedents and policies in other aspects of the Railroad Retirement Act throughout its legislative history is obviously rational and is intimately related to the legislative purpose to eliminate the financial drain which threatened the continued existence of the Railroad Retirement System. It was clear from the very beginning of the legislative deliberations that the dual benefit had to be abolished. The Congressional concern was over the extent and manner of the phase out, if indeed there was to be one. Because cost was an overriding factor and since it could not in any sense be borne by the Railroad Retirement Account, the problem was to find a new source for financing the dual benefits which were to be preserved for the "equitably entitled" during the phase out process.

In selecting the Federal Treasury as the new source, the Congress drew lines recognizing equitable entitlement in a way most compatible with the appropriation concerns which so deeply troubled the Administration.

CONCLUSION

We submit that the record in this respect is so clear and so convincing that the decision below should be summarily reversed.

Respectfully submitted,

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APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

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S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974) ..... *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE APPELLANT

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.S. App. 1a-32a) are not reported.

JURISDICTION

The judgment of the district court (J.S. App. 33a-35a) was entered on July 27, 1979. A notice of appeal was filed on August 22, 1979, and the jurisdictional statement was filed on December 5, 1979.

The Court noted probable jurisdiction on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Sections 3(h)(1)-(4) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h)(1)-(4), are reprinted at J.S. App. 38a-43a.

QUESTION PRESENTED

Whether Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), violates the Due Process Clause of the Fifth Amendment because it distinguishes between classes of annuitants, with respect to the amount of benefits they receive, based on their affiliation with the railroad industry on the effective date of the Act or when they retired.

STATEMENT

1. The Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, "provides a system of retirement and disability benefits for persons who pursue careers in

the railroad industry." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573 (1979). The Act is designed to "encourage older workers to retire by providing them with the means 'to enjoy the closing days of their lives with peace of mind and physical comfort,' and so [to] 'assure more rapid advancement in the service' and also more jobs for younger workers." *Id.* at 573-574, quoting H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 (1935).

Railroad employment is not covered by the Social Security Act, 42 U.S.C. 401 *et seq.* (see 42 U.S.C. 410(a)(9); 45 U.S.C. 231q(1)),[1] but the railroad retirement system is nevertheless interwoven with the social security system in many respects. See generally Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 3-21, 51-75, 167-180 (1972) (hereinafter *Report of the Commission on Railroad Retirement*). Indeed, 45 U.S.C. 231b (h), the provision challenged by appellee in this case, was enacted to limit what Congress perceived to be a windfall accruing to some former railroad employees as a result of an overlap in railroad retirement and social security benefits. Some explication of the interrelationship between the two programs is therefore necessary to an understanding of the issue presented.

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[1] However, if a railroad employee does not attain the 10 years of railroad service necessary to be eligible for railroad retirement benefits, his railroad service is credited as employment under the Social Security Act. 45 U.S.C. 231q(2).

a. Benefits under the Railroad Retirement Act are paid out of the Railroad Retirement Account established in the Treasury by 45 U.S.C. 231n(a) and financed by employment taxes imposed on railroads and their employees. See *Report of the Commission on Railroad Retirement* 7-8, 17-18. Railroads and their employees each pay a basic tax that is fixed by statute at the same rate (now 6.13% of wages) as that established for social security payroll taxes. See 26 U.S.C. 3101, 3111, 3201 and 3221(b). On top of this basic payroll tax, the railroads alone pay an additional tax in the amount of 9.5% of taxable wages. 26 U.S.C. 3221(a).[2]

In 1951, Congress instituted a system of financial interchange between the railroad retirement and social security programs, under which the Railroad Retirement Account was, in effect, reinsured by the

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[2] Prior to 1973, the payroll tax had been divided equally between railroads and their employees. 26 U.S.C. (1970 ed.) 3201, 3221(a). In that year, the social security level payroll tax imposed on both employees and employers and the additional 9.5% tax imposed on employers alone were substituted for the equal payroll taxes. Sections 102(a) and (d) of Pub. L. No. 93-69, 87 Stat. 162.

Since 1966, railroads alone have also paid an additional tax, fixed by the Railroad Retirement Board on a quarterly basis, to finance a special supplemental annuity under 45 U.S.C. 231a(b)(1) for retired railroad employees who had 25 or more years of railroad service and had reached age 65 (or had 30 years of service and reached age 60) and had a current connection with the railroad industry (see 45 U.S.C. 231(o)) when they retired. 26 U.S.C. 3221(c), as added by Pub. L. No. 89-699, Section 301(e), 80 Stat. 1078. This supplemental tax was fixed by the Board at the rate of 12.5 cents for each man-hour of employment for the second quarter of 1980. 45 Fed. Reg. 13242 (1980).

Social Security Trust Fund. Ch. 632, Section 22(b), 65 Stat. 687. See *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 575. Under this arrangement, which is still in effect (see 45 U.S.C. 231f(c)(2)), funds are transferred each year from the Railroad Retirement Account to the Social Security Trust Fund in an amount equal to the social security taxes that would have been paid by the railroads and their employees if railroad service were covered by the Social Security Act. In return, funds are transferred from the Social Security Trust Fund to the Railroad Retirement Account each year in an amount equal to the benefits that would have been paid under the Social Security Act to retired railroad employees, their dependents, and survivors if the employees' railroad service were covered by the Social Security Act. See generally S. Rep. No. 93-1163, 93d Cong., 2d Sess. 2-3 (1974); H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2-3 (1974); *Report of the Commission on Railroad Retirement* 7-9, 19-20, 62-63. As explained below, however, these reinsurance payments from the Social Security Trust Fund are reduced in certain instances.

Prior to 1975, a retired individual who had the requisite 10 years of railroad service to be eligible for railroad retirement benefits (see 45 U.S.C. 231a(a)(1)) and who also had been employed outside the railroad industry for a sufficient period to qualify for benefits under the Social Security Act could receive the full social security benefits to which he was en-

titled in addition to his full railroad retirement benefits. However, in order to prevent multiple payments from the Social Security Trust Fund on behalf of an individual receiving such dual benefits, the annual payment from the Trust Fund to the Railroad Retirement Account was reduced by the total of the social security benefits that the individual received directly from the Trust Fund for his nonrailroad work.[3]

Because the Social Security Act grants proportionately greater benefits than does the Railroad Retirement Act to persons with relatively short periods of service and low wages,[4] the reduction in the reinsurance payment from the Social Security Trust Fund to the Railroad Retirement Account on behalf of an individual receiving benefits under both programs was disproportionately large. The excess cost of dual benefits was, accordingly, borne entirely by the Railroad Retirement Account. See H.R. Rep. No. 93-1345, *supra*, at 2-3; S. Rep. No. 93-1163, *supra*, at 2-3;[5] *Report of the Commission on Rail-*

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[3] This reduction in the payment from the Trust Fund to the Railroad Retirement Account continues to be made under the present 45 U.S.C. 231f(c)(2).

[4] This difference results from the fact that social security benefits are established at a level thought to be adequate for the living expenses of lower-paid workers, while railroad retirement benefits are more directly tied to past service and earnings. See *Hisquierdo* v. *Hisquierdo, supra*, 439 U.S. at 574-575; *Report of the Commission on Railroad Retirement* 6-7, 51, 179, 349.

[5] The House and Senate Reports on the Railroad Retirement Act of 1974 presented the following chart to illustrate the impact of dual benefits on the Railroad Retirement Account

road Retirement 8-9, 24, 73, 344, 355-356. And because retirees eligible for benefits under both pro-

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(H.R. Rep. No. 93-1345, *supra*, at 3; S. Rep. No. 93-1163, *supra*, at 3):

FINANCING DUAL BENEFITS

Railroad Employee With 35 Years of Service— No Social Security Employment	Railroad Employee With 35 years of Service During 10 Years of Which He Also Had Social Security Employment
Income to Social Security	
35 years of SS taxes	45 years of SS employer taxes 35 years of SS employee taxes
Income to Railroad Retirement	
35 years of RR taxes (excess over SS)	35 years of RR taxes (excess over SS) 10 years of SS employee taxes
Benefits to Employee	
(a) Total RR benefit $600	(a) Total RR benefit [1] $550 (b) SS benefit 250 (c) Combined benefit $800
Financing of Benefits	
(a) Through Financial Interchange: Entire SS component $320	(a-1) Through Financial Interchange: $320 less $250 $ 70 (a-2) Direct by SS $250
(b) By Railroad Retirement fund: RR component $280	(b) By Railroad Retirement fund: $480
Cost of Dual Benefit to Railroad Retirement Fund	[2] $200

[1] Certain offsets are made against RR retirement benefits where the individual is entitled to Social Security benefits.

[2] $250 reduction in financial interchange less $50 reduction described in footnote 1.

grams received their full railroad retirement benefits despite the disproportionate reduction in the reinsurance payment on their behalf from the Social Security Trust Fund, recipients of dual benefits caused a substantial and accelerating drain on the Railroad Retirement Account.[6] This drain was one of several factors, including reduced railroad employment and rising benefits, that placed the financial soundness of the railroad retirement system in jeopardy by the late 1960's and early 1970's. See S. Rep. No. 93-1163, *supra*, at 2-3; H.R. Rep. No. 93-1345, *supra*, at 2-3; *Report of the Commission on Railroad Retirement* 8-9, 73, 129-139, 344, 362, 365. Indeed, the committee reports on the Railroad Retirement Act of 1974 predicted that if the previous system had been permitted to continue, "the Railroad Retirement system will be bankrupt by 1981, and there will be insufficient funds available to pay benefits at the present level to anyone—past, present, or future beneficiaries." S. Rep. No. 93-1163, *supra*, at 7; H.R. Rep. No. 93-1345, *supra*, at 7.

b. Against this background, Congress in 1970 created the Commission on Railroad Retirement to study the actuarial soundness of the railroad retirement system. Pub. L. No. 91-377, Section 7, 84 Stat. 792-794. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S.

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[6] The prospective net drain on the Railroad Retirement Account was estimated at $480 million per year from 1970 to the year 2000 if the then-existing system of dual benefits had remained in effect. *Report of the Commission on Railroad Retirement* 9, 73.

at 574 n.3. The Commission's final report, submitted to Congress on June 30, 1972, recommended that the basic railroad retirement annuity be divided into two components, one to correspond to the level of social security benefits nonrailroad workers receive (the "social security component") and the other representing an additional reward for railroad service (the "staff component"). *Report of the Commission on Railroad Retirement* 22-23, 502-503.

The Commission recommended in addition that the "windfall" accruing to persons receiving both railroad retirement and social security benefits be eliminated in the future, in part because of the financial drain dual benefits created on the Railroad Retirement Account. The Commission also found it unfair that employees who split their careers between railroad and nonrailroad work could receive greater retirement benefits for comparable service and contributions than employees who spent their entire careers in the railroad industry, particularly because the payroll taxes of career railroad employees bore much of the burden of the excess cost of dual benefits. *Report of the Commission on Railroad Retirement* 344-345, 349-357, 366-367. However, the Commission did recommend the inclusion of special transitional or "grandfather" provisions to protect, in varying degree, the expectations of retired employees who were already receiving benefits under both the social security and railroad retirement programs and certain other present and former rail-

road employees who anticipated receiving such dual benefits in the future. *Id.* at 367-369.[7]

Following receipt of the Commission's proposals, Congress requested representatives of railroad employees, retirees, and carriers to submit a report containing their recommendations to ensure the solvency of the railroad retirement system, based upon their negotiations and taking into account the specific recommendations of the Commission. Pub. L. No. 92-460, Section 6, 86 Stat. 767. That report was submitted to Congress on February 27, 1973. It called attention to the complexities of the problem and indicated that substantial progress had been made in arriving at mutually agreeable solutions. See H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27. Congress then requested

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[7] The Commission recommended that individuals or families already on the beneficiary roles continue to receive dual benefits and that their actual social security benefits and the portion of their railroad retirement annuity that corresponded to social security payments should be increased with the cost of living or otherwise as Congress provided for social security benefits. However, the Commission recommended that the additional "staff component" attributable only to railroad service should not be increased with the cost of living as long as the total of guaranteed grandfather benefits exceeded the benefits that would be paid under the Commission's proposed restructuring of the railroad retirement system. The Commission recommended that persons who were fully insured under both programs but were not yet retired also be protected, but that their "staff component" likewise be frozen as of the statutory changeover date. *Report of the Commission on Railroad Retirement* 368-369. Thus, the gap between those who were receiving dual benefits and those who were not would have narrowed over time under the Commission's proposal.

representatives of management and labor to develop and submit recommendations in the form of a draft bill. Pub. L. No. 93-69, Section 107, 87 Stat. 165. The bill eventually introduced and enacted as the Railroad Retirement Act of 1974 was based on the recommendations of the Joint Labor-Management Railroad Retirement Negotiating Committee established under Pub. L. No. 93-69. H.R. Rep. No. 93-1345, *supra*, at 28; S. Rep. No. 93-1163, *supra*, at 27.[8]

c. The Railroad Retirement Act of 1974 followed the suggestion of the Commission on Railroad Retirement that the retirement annuity be divided into two basic components, one corresponding to social security benefits and the other a supplemental benefit attributable to railroad service. In this respect, as the Court noted in *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574, the Act resembles both a private pension program and a social welfare plan. The upper, and smaller, tier of an annuity under the Act (the "staff component") is tied to the employee's earnings and career service in the railroad industry alone. 45 U.S.C. 231b(b). The lower, and larger, tier corresponds to the total benefits that the employee would receive if all of his railroad service had

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[8] The process by which the bill was introduced following industry negotiations was not novel. The Railroad Retirement Act of 1937 was also the product of extensive negotiations between management and labor, following presidential intervention. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 574 n.3. *Report of the Commission on Railroad Retirement* 58.

been covered by the Social Security Act. 45 U.S.C. 231b(a).

The "social security component" is computed on the basis of the employee's combined railroad and nonrailroad service using the benefit computation provisions found in the Social Security Act. 45 U.S.C. 231b(a). However, if the employee is also eligible to receive benefits under Title II of the Social Security Act because he was employed outside the railroad industry for a sufficient period of time (generally 40 quarters) to be permanently insured under that Act, the "social security component" of his railroad retirement annuity is reduced by the amount he is paid directly from the Social Security Trust Fund for his nonrailroad service. 45 U.S.C. 231b (m). It is this offset provision in 45 U.S.C. 231b (m) that effectively eliminates the receipt of dual benefits under the two programs in the future. In this respect, Congress followed the recommendation of the Commission on Railroad Retirement.

Congress also followed the Commission's recommendation by including transitional protection in the 1974 Act for retired employees who were already receiving dual benefits and, in certain situations, for other present and former employees who had an expectation of receiving such benefits at the time the new legislation was adopted. As explained below, however, the grandfather clause proposed by the Joint Labor-Management Railroad Retirement Negotiating Committee and enacted by Congress is narrower than that first recommended by the Commis-

sion on Railroad Retirement, which proposed that entitlement to dual benefits be preserved for *all* individuals who had 10 years of railroad service and were permanently insured under the Social Security Act as of the effective date of the Commission's proposed amendments.[9]

The grandfather protection in the 1974 Act first provides, in Section 204(a)(3) (45 U.S.C. 231 note), that individuals already retired and receiving dual benefits before January 1, 1975, may continue to receive them. Grandfather protection for individuals not yet retired as of that date is embodied in the form of a third component of benefits, commonly called the "windfall component" because of its favorable ratio of benefits received to social security payroll taxes paid. This "windfall component" is available in some situations in which the "social security component" of an individual's railroad annuity has

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[9] Congress determined that the future payment of these limited dual or "windfall" benefits given grandfather protection should be funded by general revenues, rather than payroll taxes imposed on railroads and their employees, and it authorized the appropriation of the funds necessary to cover these benefits. 45 U.S.C. 231n(d). The cost to the Treasury was estimated to be $285 million per year through the year 2000 (H.R. Rep. No. 93-1345, *supra*, at 5; S. Rep. No. 93-1163, *supra*, at 5), or about $7 billion in all. See *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575. The Railroad Retirement Board now estimates that the cost of the "windfall" benefits under the 1974 Act will be at least $499 million annually through the year 2000, or $529 million annually if inflation continues indefinitely at a rate ranging between 5.75% and 7.9%. Railroad Retirement Board, *Fourteenth Actuarial Valuation of the Assets and Liabilities Under the Railroad Retirement Acts as of December 31, 1977*, at x, 9, 39 (Dec. 1979).

been reduced pursuant to 45 U.S.C. 231b(m) by the amount of the actual social security benefits the individual receives for his nonrailroad service. In order to qualify for any "windfall component," the retired employee must have completed the 10 years of railroad service necessary to be eligible for any railroad retirement benefits by January 1, 1975 (the effective date of the 1974 Act) and must have been premanently insured under the Social Security Act on one of two dates. If the retired employee (i) performed some creditable railroad service in calendar year 1974, (ii) had a "current connection with the railroad industry" as of December 31, 1974 (or such later date as he retired),[10] or (iii) completed 25 years of railroad service as of December 31, 1974, he is entitled to a "windfall" benefit if he was permanently insured under the Social Security Act as of December 31, 1974. 45 U.S.C. 231b(h)(1). However, if the retired employee left the railroad industry with 10 years of service before 1974 without having completed 25 years of service and did not retain a "current connection" with the industry at the close of 1974, he is entitled to a "windfall" benefit only if he

[10] The term "current connection with the railroad industry" is defined in 45 U.S.C. 231(*o*) to mean, in general, employment in the railroad industry in 12 of the preceding 30 calendar months. Thus, an employee who left the railroad industry well before 1974 but who was reemployed in the industry after 1974 in 12 of the 30 months preceding his retirement is eligible to receive a "windfall component" if he had the requisite 10 years of railroad service and was permanently insured under the Social Security Act as of December 31, 1974.

was permanently insured under the Social Security Act at the end of the year in which he left the railroad industry. 45 U.S.C. 231b(h)(2).[11]

Thus, a retired employee who left the railroad industry for other employment before 1974, was not permanently insured under the Social Security Act when he did so, and did not return to the railroad industry and reestablish a "current connection" with it before retiring cannot receive *any* "windfall" benefit, even if he performed sufficient nonrailroad service after he left the railroad industry to become perma-

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[11] The amount of the "windfall component" is greater under subsection (1) than under subsection (2) of 45 U.S.C. 231b(h). The former consists of a social security level benefit based on social security service through December 31, 1974, plus a social security level benefit based on railroad service through December 31, 1974, minus a social security level benefit based on combined social security and railroad service through December 31, 1974. The formula used under subsection (2) is similar, except that only social security service through the year the individual left the railroad industry, rather than through December 31, 1974, is used in computing the amount of the benefit. This difference in the date through which social security service is counted corresponds, of course, to the difference under the two subsections in the date by which the retired employee must have been permanently insured under the Social Security Act in order to be eligible for any "windfall component."

The "windfall" benefits under 45 U.S.C. 231b(h)(1) and (2) are frozen as of the date of the individual's retirement (H.R. Rep. No. 93-1345, *supra*, at 11-12; S. Rep. No. 93-1163, *supra*, at 11-12), much as the Commission on Railroad Retirement recommended. See note 7, *supra;* compare 45 U.S.C. 231b(h)(5). Thus, the relative gap between those who receive these special benefits and those who do not will narrow as the social security and railroad retirement annuities are increased with the cost of living.

nently insured under the Social Security Act by December 31, 1974. Appellee Fritz and the class he represents fall into this category (J.S. App. 2a), and they herein challenge their resultant ineligibility to receive a "windfall" benefit.

2. On July 26, 1976, L. Jackson Lipp and William D. Gibson filed a class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U.S.C. 231b (h) is unconstitutional under the Due Process Clause of the Fifth Amendment because it irrationally distinguishes between classes of annuitants. The government moved to dismiss on October 8, 1976, arguing, *inter alia*, that because the named plaintiffs were not yet eligible to retire, they did not have standing to bring the suit. In response to the government's motion to dismiss the first complaint, an amended complaint was filed on December 8, 1976, naming as an additional plaintiff appellee Gerhard H. Fritz, a former railroad worker who had left the industry in 1956 and had become eligible to receive railroad retirement benefits upon his retirement from all employment on October 1, 1976, but who was not eligible to receive any "windfall" benefits. The district court eventually certified a class, represented by appellee Fritz, of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any "windfall component" because they had left the railroad industry before 1974, had no "cur-

rent connection" with it at the end of 1974, and had less than 25 years of railroad service (J.S. App. 2a).

3. On cross motions for summary judgment, the district court held that 45 U.S.C. 231b(h) creates an irrational and unconstitutional distinction between classes of annuitants. It therefore ordered (J.S. App. 33a-34a) that members of appellee's class be paid the full "windfall component" payable under 45 U.S.C. 231b(h)(1).[12]

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[12] The district court's certification of a class of former railroad employees who had retired by January 31, 1977, avoided the issue, raised by the government in its motion to dismiss the first complaint, that persons who had not yet retired and were therefore not yet eligible to receive railroad retirement benefits suffered no present injury entitling them to bring the suit. The district court nevertheless concluded that its holding that 45 U.S.C. 231b(h) unconstitutionally distinguishes between annuitants would apply equally to railroad employees who retired after January 31, 1977 (J.S. App. 31a-32a). The court, in its judgment, therefore ordered plaintiffs to initiate proceedings to compel the Railroad Retirement Board to prepare a plan (if the Board did not prepare such a plan on its own initiative) for the payment of benefits to the members of this "general class" of all employees who retired after January 31, 1977, in the same manner as the court had ordered benefits paid to the members of the certified class (J.S. App. 34a-35a).

The district court's reasoning would probably also require the payment of the greater "windfall" benefits provided under 45 U.S.C. 231b(h)(1) to persons who left the railroad industry before 1974 but were qualified to receive the reduced "windfall" benefit under 45 U.S.C. 231b(h)(2) because they were permanently insured under the Social Security Act when they left the industry.

Comparable "windfall" benefits are also provided in 45 U.S.C. 231b(h)(3) and (4) for employees who had 10 years of railroad service and whose spouses were permanently in-

The district court acknowledged that the distinction drawn by Congress with respect to the total amount of benefits a retired employee may receive does not result in deprivation of a fundamental right or impose a burden based upon suspect criteria and that the discrimination against appellee's class must therefore be "arbitrary, capricious and irrational before such discrimination can be held unconstitutional" (J.S. App. 28a). However, after finding that the 1974 Act was intended "to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons entitled before December 31, 1974, to receive their full benefits under both Social Security and Railroad Retirement earned and 'vested' under the previous law" (*ibid.*), the court concluded (*id.* at 30a) that the discrimination against appellee was not rationally related to these congressional purposes.

The district court relied primarily on the recommendations of the Commission on Railroad Retirement in support of its conclusion that the 1974 Act had the purpose to "protect completely" the dual benefits of railroad employees. The court conceded

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sured under the Social Security Act either in 1974 or at the time when the covered employee left the railroad industry. And 45 U.S.C. 231c(e) provides for the payment of "windfall" benefits to a spouse of a railroad employee who satisfied the criteria of eligibility for a "windfall" benefit under 45 U.S.C. 231b(h)(1) or (2). See also Sections 204(a)(4), 206(3) and 207(3) of the 1974 Act (45 U.S.C. 231 note) (transitional protection for such persons already receiving dual benefits when the Act was passed).

(J.S. App. 14a-15a, 18a-19a, 30a) that the Joint-Labor-Management Railroad Retirement Negotiating Committee had departed from this aspect of the Commission's proposal by recommending that Congress treat retirees in appellee's position in the manner mandated by 45 U.S.C. 231b(h). But the court found (J.S. App. 30a) that this departure was motivated by a desire on the part of the labor negotiators on the Joint Committee to increase future benefits for persons still in the railroad industry at the expense of those, such as appellee, who had left. In the court's view (*ibid.*), this breach of what it characterized as the "railroad labor union's duty of fair representation" owed to appellee heightened the arbitrariness, capriciousness, and irrationality of the distinction drawn in 45 U.S.C. 231b(h).

Finally, the court was influenced by what it found to be the Joint Committee's inadequate explanation of its recommendation to Congress, the failure of the Joint Committee and the Railroad Retirement Board to notify representatives of appellee's class of the proposed changes, and the failure of the responsible committees of Congress to invite representatives of appellee's class to testify regarding the legislation (J.S. App. 13a, 15a, 17a-19a). In sum, the court found that Congress did not understand the law it enacted, in part because of what it considered to be the Joint Committee's obfuscation, and that this factor bore "adversely on the rationality of a statutory

discrimination between similarly situated persons" (*id.* at 30a).[13]

SUMMARY OF ARGUMENT

A. Railroad retirement annuities are not contractual in nature, and Congress may alter or eliminate them at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575. When Congress passed the Railroad Retirement Act of 1974, it therefore could have wholly eliminated dual benefits accruing under the Social Security Act and Railroad Retirement Act by

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[13] Appellee does not take issue with the failure of the district court to convene a three-judge district court in this case pursuant to 28 U.S.C. (1970 ed.) 2282, which was repealed as of August 12, 1976, except as to actions commenced on or before that date. Pub. L. No. 94-381, Sections 2 and 7, 90 Stat. 1119-1120. For the reasons set forth in the Jurisdictional Statement (pages 11-12 n.6), we believe the district court properly declined to hold that the amended complaint filed on December 8, 1976, must relate back to July 26, 1976, the date of the original complaint, for purposes of the three-judge court provision that had been repealed in the interim. The named plaintiffs in the original complaint are not members of the certified class represented by appellee Fritz and were not yet eligible to retire when the complaint was filed. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 704 (1979); *Mathews* v. *Diaz*, 426 U.S. 67, 71-72 n.3 (1976).

This Court has jurisdiction of this appeal under 28 U.S.C. 1252, even if the district court erred in failing to convene a three-judge court. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); see also *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). If the Court were to conclude that a three-judge court should have been convened, the proper course would be to vacate the judgment below and remand with directions to convene a three-judge court. *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 32 n.12.

declining to include *any* grandfather protection for present and former railroad employees who were already receiving such benefits or had an expectation of doing so when they retired. But Congress chose instead to provide some grandfather protection for those individuals who it believed had the strongest equitable claim to receiving dual benefits under prior law. Such a grandfather clause embodying a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976).

B. The lines drawn in establishing eligibility criteria for grandfather protection under the 1974 Act are reasonably related to the achievement of a number of legislative purposes underlying that Act.

1. A principal purpose of the "windfall" benefit provisions in Section 204(a)(3) of the 1974 Act and 45 U.S.C. 231b(h) is to acknowledge the relative equities of beneficiaries. In enacting those sections, Congress concluded that retired railroad workers already receiving dual benefits on the effective date of the 1974 Act and other individuals who had 25 years of railroad service or were affiliated with the railroad industry either in 1974 or when they later retired had a somewhat stronger equitable claim to receive "windfall" benefits than did individuals such as appellee, who had left the industry before 1974 and never returned to it before their retirement. Congress could rationally determine in this regard that individuals who remained in the industry generally would be more dependent on a railroad annuity for retirement security than those who took

employment elsewhere, and would be more deserving of "windfall" benefits because of their continued commitment to the industry for which the special statutory retirement program was designed.

Moreover, persons in appellee's position did not even earn their statutory entitlement to dual benefits under prior law while they were still employed in the railroad industry. They accrued sufficient non-railroad service to be permanently insured under the Social Security Act, and therefore became entitled to dual benefits under prior law, only *after* they left the industry and were no longer in employment covered by the Railroad Retirement Act.

2. The eligibility criteria in 45 U.S.C. 231b(h) also further the more general statutory purpose of the 1974 Act of providing retirement benefits for career railroad employees. *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 573-574. Appellee concedes that the allowance of "windfall" benefits to all persons with 25 years of service is appropriate because such persons may properly be considered career employees. The requirement that an individual have attained at least 10 years of railroad service by December 31, 1974, in order to be eligible for a "windfall" benefit, which appellee also concedes is appropriate, is likewise intended to be some measure of career status.

By the same token, the requirement that an individual with more than 10 but less than 25 years of railroad service as of December 31, 1974 have a "current connection" with the railroad industry on that date or when he later retires in order to be

eligible for a full "windfall" benefit under 45 U.S.C. 231b(h)(1) is reasonably related to identifying persons likely to have career status. The "current connection" test has been used since 1946, for example, in determining eligibility for disability and survivor benefits intended for career railroad employees (45 U.S.C. 231a(a)(1)(iv), 231a(d)(1)), and it has been used since 1966 in determining eligibility for a special supplemental annuity under 45 U.S.C. 231a(b)(1). Based on this experience, Congress could also reasonably conclude in 1974 that individuals who had a "current connection" with the industry when Congress considered and passed the legislation or when they later retired were more likely than others to be career employees deserving of "windfall" benefits. In addition, the "current connection" criterion, like the alternative criterion of some railroad employment in 1974, is reasonably related to the statutory purpose of opening railroad jobs for younger workers by creating an incentive for older workers to retire (*Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 573-574), because the incremental retirement incentive provided by eligibility for "windfall" benefits obviously would open additional railroad jobs only if the individual was still in the industry when he retired.

3. Finally, the restrictions on receipt of "windfall" benefits under the 1974 Act avoid the substantial financial drain on the Railroad Retirement Account or on general revenues that would have resulted from broader grandfather protection. The district court's

order in this case, for example, would result in payment of an additional $119 million in "windfall" benefits for each of the next 20 years. For this reason, if the Court were to conclude that 45 U.S.C. 231b(h) creates an unconstitutional distinction in the allocation of "windfall" benefits, the appropriate remedy would be to strike the "windfall" provisions altogether (except to the extent such benefits are made available to persons with 25 years of railroad service or who were already receiving dual benefits in 1974), rather than to expand the coverage in a way that would cost $119 million annually.

C. The district court found the statutory classification in 45 U.S.C. 231b(h) irrational in part because it was inconsistent with what the court found to be the statutory purpose to "protect completely" the entitlement to "windfall" benefits of all present and former employees (including appellee) who had 10 years of railroad service and were permanently insured under the Social Security Act on December 31, 1974. The court's characterization of the reasons for the 1974 Act is clearly incorrect, because Congress' purpose *not* to protect persons in appellee's class is evident from the plain language of 45 U.S.C. 231b (h) as well as the committee reports and hearings on the bill. There is also no merit to the district court's conclusion that the Joint Labor-Management Railroad Retirement Negotiating Committee acted unreasonably or violated a duty of fair representation to appellee in developing and submitting its legislative recommendations, which excluded appellee from eligibility for "windfall" benefits. In any event, the

Joint Committee's actions have no bearing on the constitutionality of the statute Congress enacted. It is likewise irrelevant that Congress may have had alternative means to correct the financial difficulties of the railroad retirement system, because the allocation of social welfare benefits from a limited pool of resources is a legislative, not a judicial, function.

ARGUMENT

45 U.S.C. 231b(h) SATISFIES THE DUE PROCESS CLAUSE BECAUSE CONGRESS HAD A RATIONAL BASIS FOR EXCLUDING FROM ELIGIBILITY FOR "WINDFALL" RAILROAD RETIREMENT BENEFITS THOSE INDIVIDUALS WHO LEFT THE RAILROAD INDUSTRY PRIOR TO 1974, BEFORE THEY WERE PERMANENTLY INSURED UNDER THE SOCIAL SECURITY ACT

A. Section 3(h) Of The Railroad Retirement Act Of 1974 Steers A Middle Course Between The Concededly Constitutional Options Of Providing Broad Grandfather Protection And Providing No Grandfather Protection At All

Congress was confronted in 1974 with the possible bankruptcy of the Railroad Retirement Account by 1981, stemming in large measure from the drain on the Account caused by annuitants who received benefits under both the Social Security Act and the Railroad Retirement Act. At the same time, Congress recognized that many present and former railroad employees might have a legitimate expectation of receiving dual benefits if they satisfied the eligibility requirements under the two statutes before retirement.

As the district court recognized (J.S. App. 31a) and appellee concedes (Motion to Affirm 7), railroad retirement annuities, like social security benefits, are not contractual, and Congress may alter or eliminate them at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575. See also *Flemming* v. *Nestor*, 363 U.S. 603, 610-611 (1960). Accordingly, Congress could have wholly eliminated dual benefits under the Social Security and Railroad Retirement Acts by declining to include *any* "windfall component" or comparable grandfather protection in the 1974 Act, even for retired employees who had already begun to receive dual benefits. This would have immediately halted the severe financial drain on the Railroad Retirement Account occasioned by dual benefits, but at the expense of those individuals having the strongest expectation of receiving them.

Alternatively, Congress could have written a broad grandfather clause that preserved the potential for receiving maximum benefits under the Social Security Act and Railroad Retirement Act for everyone who had ever worked in the railroad industry prior to the effective date of the 1974 Act, whether or not he had left the railroad industry for other work, had yet attained 10 years of railroad service, or had performed any nonrailroad service that could be credited toward eligibility under the Social Security Act. But this would have permitted a sizable drain on the Account for many years in order to protect even the remotest expectation of receiving dual benefits.

Congress instead chose a middle course, tailoring the class of potential recipients of "windfall" benefits to correspond more precisely to that which it believed had the strongest equitable claim to receive such benefits. Although the more drastic options of providing grandfather protection for either everyone or no one who had been employed in the railroad industry before the effective date of the 1974 Act would concededly have been constitutional, appellee nevertheless argues that the carefully tailored accommodation Congress fashioned between these polar extremes violates the Due Process Clause. But a grandfather provision embodying a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976). Once it is conceded that Congress may appropriately draw a line somewhere in establishing threshold qualifications for special retirement benefits, Congress' choice is not unconstitutional merely because a court may have drawn the line elsewhere as a matter of policy. *Mathews* v. *Diaz*, 426 U.S. 67, 82-84 (1976).

B. Section 3(h) Of The 1974 Act Is Rationally Related To The Act's Legislative Purposes

The distinctions drawn in 45 U.S.C. 231b(h) on the basis of an employee's affiliation with the railroad industry in 1974 or upon retirement do not burden fundamental rights or create classifications that rest upon suspect criteria. *Vance* v. *Bradley*, 440 U.S. 93, 96-97 (1979); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973). Thus, the statutory classifications are unconstitutional only

if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley, supra,* 440 U.S. at 97. See also *Califano* v. *Aznavorian,* 439 U.S. 170, 174-175 (1978); *Califano* v. *Jobst,* 434 U.S. 47, 53 (1977); *Califano* v. *Goldfarb,* 430 U.S. 199, 210 (1977). As the Court stated in *Flemming* v. *Nestor, supra,* 363 U.S. at 611:

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

See also *Weinberger* v. *Salfi,* 422 U.S. 749, 768 (1975); *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971). Here, 45 U.S.C. 231b(h) is rationally related to the statutory purposes of recognizing the relative equities of beneficiaries, furnishing benefits to career railroad employees, and protecting the financial integrity of the Railroad Retirement Account.[14]

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[14] It "is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor, supra,* 363 U.S. at 612 (although, as explained below, the background and legislative history of the 1974 Act indicate that the factors mentioned in the text in fact were the reasons for the revisions in the Railroad Retirement Act). "Legislatures are presumed to have acted constitutionally * * * and their statutory classifications will be set aside only

1. ***Recognizing The Relative Equities Of Beneficiaries***

A principal rationale of any grandfather provision is equity. Congress concluded that retired workers already receiving dual benefits in 1974 and other present and former employees who had 25 years of service in the railroad industry, had worked in the industry in 1974, or had a current connection with the industry at the end of that year or at the time of their subsequent retirement had somewhat stronger equities in retaining the expectation of receiving the "windfall" of dual benefits afforded by the Railroad Retirement Act than did those—such as appellee—who had left the industry prior to 1974 and never returned before their retirement. H.R. Rep. No. 93-1345, *supra*, at 11; S. Rep. No. 93-1163, *supra*, at 11.[15] In this regard, Congress' judgment was in ac-

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if no grounds can be conceived to justify them." *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971), quoting *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969). See also *Vance* v. *Bradley*, *supra*, 440 U.S. at 111; *Dandridge* v. *Williams*, 397 U.S. 471, 485-487 (1970). Cf. *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-167 (1973).

[15] Providing "windfall" benefits to persons with some railroad employment in 1974 is, of course, consistent with the very essence of a grandfather clause, because only these individuals were actually in employment covered by the Railroad Retirement Act at the time Congress considered and passed the extensive amendments to that Act. Providing benefits to persons who did not have railroad employment in 1974 but retained a "current connection" with the railroad industry at the end of that year has the effect of protecting workers who may have been on furlough or otherwise temporarily out of railroad work when the Act was considered and

cord with that of the Joint Labor-Management Railroad Retirement Negotiating Committee, which concluded that persons who left the industry permanently prior to 1974 and were not yet retired by 1974 "have a less strong equitable claim than those who have remained with the industry." Letter of April 10, 1974, from the Joint Labor-Management Railroad Retirement Negotiating Committee to Chairman Williams of the Senate Labor and Public Welfare Committee, reprinted at 120 Cong. Rec. 18391-18392 (1974).[16]

Congress could rationally determine that persons who left railroad employment permanently would, in general, be less dependent on their railroad retirement annuities for retirement security than those who remained in the industry, perhaps because their nonrailroad employers might have a pension plan similar to that provided under the Act. Congress could also rationally conclude that individuals who re-

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passed but who fully intended to return to railroad work. Ensuring grandfather protection for those individuals is therefore consistent with the decision to provide grandfather protection for everyone actually employed in the railroad industry in 1974.

[16] See also *Restructuring of the Railroad Retirement System: Hearings on H.R. 15301 Before the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 168, 221 (1974) (hereinafter "*1974 House Hearings*"); *Restructuring of the Railroad Retirement System, 1974: Hearings on S. 3612 Before the Subcomm. on Railroad Retirement of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 301-302, 343-344 (1974) (hereinafter "*1974 Senate Hearings*").

mained employed by a railroad have in general demonstrated a greater commitment to or affinity for the industry for which Congress designed the special statutory retirement program. See *Railroad Retirement Act Amendments, 1976: Hearing on S. 3662 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 50 (1976). Appellee Fritz, for example, left railroad employment in 1956 and never returned prior to his retirement in 1976 (J.S. App. 2a).[17]

Moreover, the Joint Committee recommended and Congress provided in 45 U.S.C. 231b(h)(2) that even persons who left the railroad industry prior to 1974

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[17] Appellee cites class member William Kirby as an example of someone who left railroad work involuntarily, and he suggests thereby that the statutory classification cannot be defended on the ground that it rewards loyalty to the industry (Motion to Affirm 19; see also *id.* at 9). But there is no indication that Kirby—who, incidentally, left railroad work in 1951 (see Affidavit of William A. Kirby, dated February 20, 1979)—is typical.

Indeed, appellee pointedly fails to describe the experience of class member Horace Lindsey, the only other individual mentioned in the Motion to Affirm (at page 19). Lindsey chose to leave the railroad industry in 1955 rather than relocate his family to a point, some 120 miles from his home, where he had been offered railroad employment (Affidavit of Horace Lindsey, dated February 15, 1979). Presumably a less senior railroad employee accepted that job, in part, perhaps, to maintain his affiliation with the industry and, again perhaps, at some hardship to himself and his family.

The foregoing merely underscores the wisdom of this Court's observation that a "broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977).

without retaining a "current connection" with it would nevertheless be eligible to receive a "windfall" benefit, lesser in amount, *if* they had attained 10 years of railroad service and were already permanently insured under the Social Security Act at the close of the year in which they last performed railroad work, rather than at the close of 1974. Thus, the only otherwise eligible former railroad employees denied "windfall" benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry but *thereafter* (and prior to January 1, 1975) became eligible for dual benefits when they performed enough nonrailroad work to become permanently insured under the Social Security Act. Congress could legitimately conclude that persons who had actually accrued a statutory entitlement to dual benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class, who were no longer even in employment covered by the Railroad Retirement Act when they became eligible for dual benefits. Cf. *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330, 348-349 (1935); *id.* at 389 (Hughes, C.J., dissenting).

The district court concluded that the irrationality or unfairness of excluding persons in appellee's position from eligibility for "windfall" benefits was underscored by the fact that they had contributed to these benefits through payroll taxes and had "earned" them—by accruing 10 years of railroad service and becoming permanently insured under the Social Se-

curity Act—in accordance with the law as it stood prior to January 1, 1975 (J.S. App. 7a, 29a, 30a). But the fact that employees had paid payroll taxes under both the Social Security Act and the Railroad Retirement Act is of no moment, because Congress provided in 45 U.S.C. 231e(d) for the refund of excess employment taxes paid by persons ineligible to receive "windfall" benefits, in order to prevent any perceived unfairness. And the fact that persons in appellee's position may have satisfied the threshold eligibility requirement for dual benefits under prior law is beside the point, because it is conceded that Congress could modify or repeal benefit provisions under that law at any time. *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 575.

2. *Providing Benefits To Career Railroad Employees*

As noted above, the Railroad Retirement Act "provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry." *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 573. The lines Congress drew in fashioning the grandfather provisions in the 1974 Act are tailored to this purpose.

For example, appellee concedes the validity of Congress' decision to provide "windfall' benefits to persons who had at least 25 years of railroad service prior to the effective date of the 1974 Act, even if they had left the railroad industry before 1974 and retained no "current connection" with the industry

then or when they retired, because "[i]t is reasonable to classify railroaders with more than 25 years as 'career' railroaders who are in a different position than those with 10-25 years of services" (Motion to Affirm 8 n.4).[18] Similarly, appellee does not dispute Congress' determination to deny dual benefits to those who had less than 10 years of railroad service by January 1, 1975, the effective date of the 1974 Act, because "the ten-year mark has historically and reasonably divided vested and non-vested railroaders" (*ibid.*).[19] The requirement that an employee have at least 10 years of railroad service in order to receive any railroad retirement benefits, now contained in 45 U.S.C. 231a(a)(1), is likewise designed to restrict

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[18] Appellee notes in this regard that "the setting of arbitrary periods of service as eligibility requirements does not implicate the equal protection clause" (Motion to Affirm 8 n.4). The same 25-year eligibility requirement is imposed as a condition to receiving the special supplemental annuity provided in 45 U.S.C. 231a(b)(1), which was intended to be a reward for career service in the industry. See *Railroad Retirement Act—Supplemental Benefits: Hearing on H.R. 17285 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 89th Cong., 2d Sess. 16, 36 (1966).

[19] Appellee also does not take issue with the requirement that a person who had not yet retired by the end of 1974 must nevertheless have become permanently insured under the Social Security Act as of the effective date of the 1974 Act (Motion to Affirm 8). We assume that appellee similarly does not dispute Congress' decision to preserve dual benefits for retirees who were already receiving them as of the effective date of the 1974 Act (Pub. L. No. 93-445, Section 204(a)(3), 88 Stat. 1353). This is the most elementary type of grandfather clause.

benefits to those who have made railroad work a major part of their careers.[20]

Appellee does challenge, however, the requirement that a beneficiary who was not already receiving dual benefits and did not have 25 years of railroad service by the end of 1974 must have had a "current connection with the railroad industry" [21] at the end of 1974 or on the date of his subsequent retirement. It is irrational, appellee asserts (Motion to Affirm 3-4, 18-19), to use this factor to distinguish among annuitants who are otherwise similarly situated in that they were permanently insured under the Social Security Act and had 10 years of railroad service as of the effective date of the 1974 Act. But what appellee overlooks is that the "current connection" test, like the vesting test, has traditionally been used to

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[20] The 10-year eligibility requirement for the receipt of any railroad retirement benefits was first added to the Railroad Retirement Act in 1951 (ch. 632, Section 2, 65 Stat. 683), to confine the railroad retirement system to meeting the needs of career railroad employees. S. Rep. No. 890, 82d Cong., 1st Sess. 14-16, 27, 56, 68 (1951); H.R. Rep. No. 976, 82d Cong., 1st Sess. 47-48 (1951) (minority views). After passage of the 1951 amendments, service of less than 10 years was credited toward eligibility under the Social Security Act. Ch. 632, Section 22(a), 65 Stat. 687; see 45 U.S.C. 231q(2). Thus, contrary to the district court's findings of fact (J.S. App. 6a), the present 45 U.S.C. 231b(h) does not represent Congress' first restriction on the receipt of railroad retirement benefits already "earned."

[21] As noted above, the term "current connection with the railroad industry" is defined in 45 U.S.C. 231(*o*) to mean employment in the railroad industry in 12 of the preceding 30 months.

ensure some measure of career status as a prerequisite to receiving benefits under the Railroad Retirement Act.

Congress first developed the "current connection" concept in 1946 as an eligibility requirement for both occupational disability and survivor annuities under the Railroad Retirement Act of 1937. Ch. 709, Sections 203, 205, 213, 60 Stat. 726-735. In testimony before the House Committee concerning this eligibility requirement, the Chairman of the Railroad Retirement Board explained that the "current connection" test was intended to divide persons who have worked in the railroad industry into two groups: "[t]hose who are regular railroad employees and those who are not." *Railroad Retirement: Hearings on H.R. 1362 Before the House Comm. on Interstate and Foreign Commerce,* 79th Cong., 1st Sess. 168 (1945). The current connection eligibility requirement for survivor and occupational disability annuities was carried forward in the 1974 Act. 45 U.S.C. 231a(a)(1)(iv) and 231a(d)(1).

In 1966, when Congress amended the Railroad Retirement Act of 1937 to provide for the payment of the supplemental annuity now provided under 45 U.S.C. 231a(b)(1) to certain long-term railroad employees (see notes 2 and 18, *supra*), a "current connection" with the industry at the time of retirement was made one of the conditions to receipt of the annuity. Pub. L. No. 89-699, Section 1, 80 Stat. 1073. This supplemental annuity was intended as a reward for

career service,[22] and it was therefore quite appropriate for Congress to require that railroad employees, in addition to having 25 years of railroad service, demonstrate their commitment to the industry by retaining an affiliation with it at the time of their retirement.

Against this background, it also was reasonable for Congress to adopt the "current connection" test as an eligibility criterion for receipt of a "windfall" benefit under the 1974 Act. Congress could legitimately determine that those who were affiliated with the railroad industry when the Act was passed in 1974, or who returned to it before their retirement, were more likely than those who had left the industry and never returned to be among the class of "persons who pursue careers in the railroad industry"—the class for whom the Railroad Retirement Act was designed. *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 573. Cf. *Railroad Retirement Board* v. *Alton R.R., supra,* 295 U.S. at 348-349; *id.* at 389 (Hughes, C.J., dissenting).

Moreover, as the Court noted in *Hisquierdo,* the Act has as one of its principal purposes to "encourage older workers to retire by providing them with the means 'to enjoy the closing days of their lives with peace of mind and physical comfort,' and so [to] 'assure more rapid advancement in the service' and also more jobs for younger workers." 439 U.S.

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[22] See *Railroad Retirement Act—Supplemental Benefits: Hearing on H.R. 17285 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 89th Cong., 2d Sess. 16, 36 (1966).

at 573-574, quoting H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 (1935). See also *Vance* v. *Bradley, supra,* 440 U.S. at 101. It was not necessary in 1974 for Congress to retain whatever incremental incentive to retire is created by the "windfall" benefit provision for those who had already left the railroad industry—*i.e.*, for those whose retirement would not assure more rapid advancement and more jobs for younger workers in the industry.

Appellee contends that all persons who satisfied the minimum duration-of-service eligibility requirements under the Railroad Retirement and Social Security Acts by December 31, 1974, are similarly situated and constitutionally entitled to identical treatment with respect to "windfall" benefits (Motion to Affirm 3-4, 18-19). But Congress may condition eligibility for benefits such as these on the *character* as well as the *duration* of an employee's ties to the industry, *Mathews* v. *Diaz, supra,* 426 U.S. at 74 n.7, 82-83, and has reasonably done so here in requiring a current nexus to the railroad industry.[23]

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[23] Appellee also questions the rationality of the provision affording full "windfall" benefits under 45 U.S.C. 231b(h)(1)(i) to a person who had *any* railroad employment in 1974, so long as he had 10 years of railroad employment and was permanently insured under the Social Security Act at the end of 1974 (Motion to Affirm 8-9, 19). But this appears to have been nothing more than a means to provide reassurance to affected persons who were actually working for railroads during the year when Congress was considering legislation to accomplish a major restructuring of their retirement system. The fact that an individual had some railroad em-

3. *Preserving the Fiscal Integrity of the Railroad Retirement System*

The Commission on Railroad Retirement, the Joint Labor-Management Railroad Retirement Negotiating Committee, and Congress all recognized that restoring the fiscal integrity of the railroad retirement system required the termination of dual benefits. The 1974 Act eliminated almost all of the actuarial deficit then facing the Railroad Retirement Account, principally by barring all future entitlement to dual benefits.

Congress was able to provide grandfather protection for persons who were already retired under Sec-

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ployment in 1974 is also a reasonably reliable indicator of *future* career status, even if it does not necessarily indicate such status in 1974.

Moreover, for those who may have left railroad employment during 1974, this eligibility criterion is fully consistent with that in 45 U.S.C. 231b(h)(2), which provides that eligibility for a "windfall" benefit depends on whether the individual was permanently insured under the Social Security Act at the end of his last year of railroad employment—in this case, December 31, 1974. It also seems likely that most persons who had any railroad employment in 1974 would also have had a "current connection with the railroad industry" at the end of that year—*i.e.*, railroad employment in 12 of the preceding 30 months. Thus, although appellee suggests (Motion to Affirm 8-9, 19) that it is irrational to deny him benefits while providing full "windfall" protection to a person who worked in the industry for just one day in 1974, it does not appear that any employee is afforded a benefit by this provision that he would not otherwise have been afforded under 45 U.S.C. 231b(h)(1) or (2). In any event, it is no objection to a statutory classification that "such rules [may] produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, *supra*, 434 U.S. at 53. Congress was entitled to legislate with the generality of cases in mind.

tion 204(a)(3) of the 1974 Act and for certain other present and former employees under 45 U.S.C. 231b(h), while at the same time preserving the fiscal integrity of the Railroad Retirement Account, only by authorizing the appropriation of general revenues to pay for these special benefits. Public funding of "windfall" benefits was one of the most controversial features of the 1974 Act,[24] and Congress might well have been unwilling to provide the larger public subsidy that would have been necessary to fund broader grandfather provisions. The Railroad Retirement Board has estimated, for example, that the district court's decision in this case requiring payment of full "windfall" benefits to everyone who had 10 years of railroad service and was permanently insured under the Social Security Act by December 31, 1974, would result in the annual payment of an additional $119 million in "windfall" benefits over the next 20 years —a total of $2.38 billion. Congress has a legitimate interest in protecting the public fisc through reasonable classifications in welfare legislation, and the Court has accorded the legislative branch wide latitude "in choosing among competing demands for limited public funds." *Maher* v. *Roe*, 432 U.S. 464, 479 (1977). See also *Califano* v. *Torres*, 435 U.S. 1, 5 n.7 (1978).

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[24] The provision for public funding of the deficit in the Railroad Retirement Account was the primary factor cited by President Ford in vetoing the 1974 Act. 120 Cong. Rec. 35609-35610 (1974). Congress subsequently overrode the President's veto. 120 Cong. Rec. 35616, 35898 (1974).

Indeed, even if appellee were to succeed on the merits of his constitutional argument, it does not appear that he would be entitled to the relief that he seeks and that was ordered by the district court (J.S. App. 33a-34a)—the payment of "windfall" benefits to all members of appellee's class. In our view, if the exclusion of the members of appellee's class is held unconstitutional, the appropriate relief would be to strike the "windfall" benefit provisions of the Act (except for individuals who were already receiving dual benefits by the end of 1974 or had 25 years of railroad service at that time), rather than to extend coverage in a way that the Joint Labor-Management Railroad Retirement Negotiating Committee and Congress expressly rejected in 1974. See note 33, *infra*.

Moreover, if Congress were to decline to appropriate monies to fund the additional "windfall" benefits mandated by the district court's order, that burden would fall on the Railroad Retirement Account.[25] The result would be the reemergence of a significant actuarial deficit in the Account. This would be inconsistent with the overriding purpose of the 1974 Act to restore the railroad retirement system to financial soundness. Thus, the limitations on receipt

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[25] As noted above (see note 9, *supra*), the projected cost of the "windfall" benefits provided by Congress has risen to an average of at least $499 million per year through the year 2000. However, Congress appropriated only $313 million to the Railroad Retirement Account for fiscal years 1979 and 1980. Pub. L. No. 95-480, 92 Stat. 1588; Pub. L. No. 96-123, Section 101(g), 93 Stat. 925 (see 125 Cong. Rec. H7123 (daily ed. Aug. 2, 1979)).

of "windfall" benefits contained in 45 U.S.C. 231b (h) serve Congress' legitimate interest in preserving the self-supporting nature of the retirement system to the extent possible. *Geduldig* v. *Aiello*, 417 U.S. 484, 496 (1974). See also *Califano* v. *Boles*, 443 U.S. 282, 296 (1979).

If Congress were unwilling either to fund the additional "windfall" payments from general revenues or to allow the reemergence of an actuarial deficit in the Railroad Retirement Account, it would be forced eventually to cut back railroad retirement benefits, either across the board or by constricting the category of persons eligible for "windfall" benefits. The former option would reduce payments below what Congress has fixed as an adequate benefit, while the latter would frustrate Congress' goal in passing the 1974 Act of concentrating "windfall" benefits for those who it believed had the strongest equitable claim to them and who are most likely to be the career employees for whom the program was designed. See *Califano* v. *Boles*, *supra*, 443 U.S. at 296.

C. The Additional Reasons Offered By The District Court Do Not Support Its Finding That The Classification In Section 3(h) Of The 1974 Act Is Irrational

The district court's principal error was in failing to appreciate that the grandfather provisions in Section 204(a)(3) of the 1974 Act and 45 U.S.C. 231 b(h) further the legitimate congressional purpose of providing a limited pool of "windfall" benefits to those with the strongest equitable claim to them and

to those most likely to be career railroad employees. The court also erred, however, in relying on a number of reasons that it believed contributed to the irrationality of excluding appellee's class from eligibility for such benefits. These reasons, for the most part, rest on faulty factual premises and are, in any event, wholly without merit.

1. *The Supposed Congressional Purpose To "Protect Completely" The "Vested" Expectations Of All Employees*

The district court observed that the purpose of the 1974 Act was to "protect completely" the expectations on the part of all persons who had 10 years of railroad service and were fully insured under the Social Security Act as of December 31, 1974, that they would receive full dual benefits upon retirement (J.S. App. 28a). In the court's view (*id.* at 30a), the distinction in Section 231b(h) that resulted in elimination of "windfall" benefits for the members of appellee's class was not reasonably related to this purpose. The court was plainly mistaken, however, in finding a congressional purpose to "protect completely" all present and former employees' expectation of receiving "windfall" benefits. Although the Commission on Railroad Retirement did initially recommend that the benefits of persons in appellee's position not be reduced, Congress was not obliged to accept this recommendation, and it in fact declined to do so. It instead accepted the recommendations of the Joint Labor-Management Railroad Re-

tirement Negotiating Committee, which were enacted in Section 204(a)(3) of the 1974 Act and 45 U.S.C. 231b(h). See pages 11-16, *supra*.

Congress' purpose *not* to "protect completely" the benefits of all railroad employees who had 10 years of railroad service and were permanently insured under the Social Security Act on the effective date of the 1974 Act—and particularly those employees in appellee's class—appears in the very language of 45 U.S.C. 231b(h) itself. See *Barrett* v. *United States*, 423 U.S. 212, 217 (1976). And if it were necessary to look beyond the clear language of the statute, the committee reports fully explain the operation of the "windfall" benefit provisions and the exclusion of those in appellee's position. H.R. Rep. No. 93-1345, *supra*, at 11-12, 38-40; S. Rep. No. 93-1163, *supra*, at 11-12, 38-39.[26] This legislative history conclusively refutes the district court's finding (J.S.

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[26] Both reports state that employees who left the railroad industry after qualifying for benefits under the Railroad Retirement Act "without having 25 years of railroad service and who do not now have a current connection to the railroad industry * * * would not receive a dual benefit, upon retirement, unless they also had fully qualified under Social Security by the close of the year prior to 1975 in which they left railroad service" (H.R. Rep. No. 93-1345, *supra*, at 12; S. Rep. No. 93-1163, *supra*, at 12). Comparable statements were made in the reports' section-by-section analyses of the bill (H.R. Rep. No. 93-1345, *supra*, at 39; S. Rep. No. 93-1163, *supra*, at 38-39).

The district court's and appellee's reliance (J.S. App. 23a-24a; Motion to Affirm 10) on general statements in the introductory sections and elsewhere in the committee reports for the proposition that Congress intended to preserve "wind-

App. 30a) that Congress was "unaware" of what it enacted in 45 U.S.C. 231b(h),[27] even assuming that the Court may appropriately look behind the detailed and plain language of the Act and attach significance to whether individual legislators may have fully understood the precise impact of the statutory classification. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 89 (1977); *Vance* v. *Bradley*, *supra*, 440 U.S. at 111.

2. *The Work of the Joint Labor-Management Railroad Retirement Negotiating Committee*

The district court also erred in concluding that the irrationality of the classification was supported by the manner in which the Joint Labor-Management Railroad Retirement Negotiating Committee developed its recommendations and submitted them to Congress. Contrary to the district court's apparent understanding (J.S. App. 10a, 12a-13a), the Joint Committee was not directed to adhere to the recommendations of the Commission on Railroad Retirement; the Joint Committee was required merely to take the Commission's recommendations into account in developing a draft bill for submission to Congress. See Pub. L. No. 93-69, Section 107(c)(1), 87 Stat.

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fall" benefits for everyone who was "vested" under both Acts is therefore misplaced. H.R. Rep. No. 93-1345, *supra*, at 2, 6; S. Rep. No. 93-1163, *supra*, at 2.

[27] As explained at pages 47-48, *infra*, representatives of the Joint Labor-Management Railroad Retirement Negotiating Committee also fully explained the operation of the bill to Congress.

165. But, in any event, the issue here is the constitutionality of an Act of Congress, not the Joint Committee's fidelity to its mission. Even if the failure of the labor representatives on the Joint Committee to insist on absolutely equal benefits for persons such as appellee would be considered to be a violation of the union's duty of fair representation in a collective bargaining context (but see *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-343 (1953); cf. *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971)),[28] that defect would have no bearing on the

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[28] Appellee contends (Motion to Affirm 6, 11-12, 14), and the district court found (J.S. App. 11a-13a), that the Joint Committee sacrificed "windfall" benefits that would have been paid to members of the class appellee represents in order to fund increased benefits under the 1974 Act that added an additional 3% to the actuarial deficit of the Railroad Retirement Account. Neither the district court nor appellee has cited any portion of the legislative record that establishes a direct *quid pro quo* relationship between the two.

In any event, the three benefit changes recommended by the Joint Committee were fully in accord with congressional policy. Two-thirds of the additional 3% actuarial deficit was attributable to an increase in the level of benefits under 45 U.S.C. 231c(g) for widows and other survivors from 110% to 130% of comparable social security benefits (see 120 Cong. Rec. 18393 (1974)); in this regard, the Joint Committee merely followed the similar recommendation of the Commission on Railroad Retirement that such benefits be set at 125% of social security benefits (*ibid.*; *Report of the Commission on Railroad Retirement* 337). Thus, the impetus for most of the increased benefits relied upon by appellee and the district court did not originate with the Joint Committee. The other 1% of the new deficit was attributable to providing full supplemental and spousal annuities under 45 U.S.C. 231a(b)(1) and 231a(c)(1) for employees retiring at age 60 with 30 years' experience. 120 Cong. Rec. 18392-18393

constitutionality of the provisions Congress enacted. Congress must be presumed to have brought its own considered judgment to bear on the merits of the legislation. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).[29]

There is likewise no merit to the district court's and appellee's belief (J.S. App. 15a-19a; Motion to Affirm 11-17) that the Joint Labor-Management Railroad Retirement Negotiating Committee was not forthcoming in explaining the operation of its "windfall" benefits recommendation—again, even assuming that this factor has any relevance to the constitutionality of Section 231b(h). Representatives of the Joint Committee fully and accurately described the "windfall" benefit provisions and the special limitations on receipt of such benefits by those who left the industry before 1974. See, *e.g.*, 120 Cong. Rec. 18392 (1974);

(1974). The unavailability of these benefits had operated as a "significant deterrent" to the early retirement Congress had sought to encourage in 1973 by providing basic retirement benefits to persons who reached age 60 and had 30 years' experience (Pub. L. No. 93-69, Section 101, 87 Stat. 162). See 120 Cong. Rec. 18392-18393 (1974); H.R. Rep. No. 93-1345, *supra*, at 17; S. Rep. No. 93-1163, *supra*, at 17. One of the principal purposes of the Railroad Retirement Act from its inception has been to encourage older workers to retire, *Hisquierdo* v. *Hisquierdo*, *supra*, 439 U.S. at 573-574, and it was reasonable for the Joint Committee to recommend changes to accomplish this end.

[29] The present case is therefore legally indistinguishable from a case in which labor and management undertake a unified lobbying effort to affect the content of a bill drafted by a congressional committee.

1974 House Hearings 167-168, 221; *1974 Senate Hearings* 300-302, 342-344.[30]

Finally, no constitutional significance may be attached to the fact that representatives of appellee's class were not specifically notified of the changes recommended by the Joint Committee, were not notified by the Railroad Retirement Board prior to passage of the 1974 Act that their benefits might be reduced, and were not called to testify before the responsible congressional committees (J.S. App. 13a, 15a).[31] An Act of Congress is not rendered unconsti-

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[30] The colloquy between Representative Dingell and William Dempsey (the Chairman of the National Railroad Labor Conference and a member of the Joint Committee) cited by the district court (J.S. App. 15a-16a, quoting *1974 House Hearings* 199, 201) did not even relate to dual or "windfall" benefits. The discussion instead concerned the formula to be used in calculating the "staff component" of an annuity. Chairman Dempsey's exchange with Senator Hathaway, also relied upon by the district court (J.S. App. 17a, quoting *1974 Senate Hearings* 333-334), concerned the Senator's suggestion that the vesting requirement for purposes of receiving dual benefits be increased beyond 10 years of service, not whether persons in appellee's position should receive benefits. The remaining statement by Chairman Dempsey, relied upon by the district court and appellee (J.S. App. 16a; Motion to Affirm 15, quoting *1974 House Hearings* 213-214), is a general comment that persons "vested" under both systems as of January 1, 1975, "had a right to rely upon the law as it existed when they were working." Chairman Dempsey did not purport to be giving a complete explanation of the detailed "windfall" benefit provisions in the bill. The discussion was centered instead on whether general revenues should be used to fund "windfall" benefits.

[31] Equally irrelevant, of course, are general statements in press releases issued by the Joint Committee at the time of

tutional merely because Congress has declined to notify or solicit the views of individuals who may be affected by it. Moreover, the 1974 Act was not an unexpected legislative development. To the contrary, it was the result of four years of public debate. Members of appellee's class presumably had the opportunity during this period to exercise the right of the people generally to petition Congress and present their views on the merits of the pending proposals.

In conclusion, however, it is appropriate to note that if the district court and appellee are correct in their assertion that the distinctions drawn in Section 231b(h) are merely the result of legislative oversight or inadequate explanation, appellee and the class he represents can secure complete relief by requesting Congress to remedy the unintentional discrimination. Cf. *Vance* v. *Bradley*, *supra*, 440 U.S. at 97 & n.12; *Delaware Tribal Business Committee* v. *Weeks*, *supra*, 430 U.S. at 90. It is in that forum, and not the courts, that any relief is appropriate.[32]

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its April 10, 1974 letter to Senator Williams and by the Railroad Retirement Board after the 1974 Act was passed (Motion to Affirm 14-15). The former, moreover, accurately stated that the Joint Committee agreed "in general" with the recommendations of the Commission on Railroad Retirement with respect to dual benefits.

[32] As appellee points out (Motion to Affirm 16), Senator Domenici introduced a bill in 1977 (S. 467, 95th Cong., 1st Sess.) that would have granted "windfall" benefits to appellee's class (see 123 Cong. Rec. 2230-2231 (1977)). Identical bills were introduced in the House. See H.R. 2720, 95th Cong., 1st Sess. (1977); H.R. 6015, 95th Cong., 1st Sess. (1977); H.R. 12256, 95th Cong., 2d Sess. (1978); H.R. 1690, 96th

3. *The Alternative Means Available To Congress To Resolve The Financial Problems Of The Railroad Retirement System*

The district court concluded (J.S. App. 29a) that the savings accruing to the Railroad Retirement Account did not justify reducing appellee's benefits because the court believed other methods were available to Congress to correct whatever fiscal problems may have existed in the railroad retirement system. The district court erred, however, in assuming that the exclusion of the members of appellee's class from eligibility for "windfall" benefits can be explained only on the ground that Congress sought to save money as a result. Congress evidently shared the view of the Joint Labor-Management Railroad Retirement Negotiating Committee that individuals who left the industry permanently have a diminished equitable claim to such benefits, and Congress could legitimately have decided to reduce appellee's benefits on that ground alone, without regard to the savings produced.

But even taking cost considerations into account, it is no constitutional objection to the statutory scheme that Congress may have had other means available to it to relieve the Railroad Retirement Account of the burden resulting from "windfall"

Cong., 1st Sess. (1979). But none of these bills has ever been reported out of committee, even after the fact that appellee's class would not receive "windfall" benefits became rather well publicized. See, *e.g.*, *Railroad Retirement Act Amendments, 1976: Hearing on S. 3662 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 48-50 (1976).

benefits. As explained above, the decision to save an estimated $2.38 billion over the next 20 years by eliminating "windfall" benefits for individuals who Congress believed to have a reduced equitable claim to them was within the range of permissible options. The choice of which way to proceed in allocating social welfare benefits is a legislative, not a judicial judgment, and the Court has accorded the legislative branch wide latitude "in choosing among competing demands for limited public funds." *Maher* v. *Roe*, 432 U.S. 464, 479 (1977).[33]

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[33] If the Court were to accept appellee's argument that 45 U.S.C. 231b(h) unconstitutionally distinguishes in the allocation of "windfall" benefits based on affiliation with the railroad industry, the relief ordered by the district court—expanding the coverage of 45 U.S.C. 231b(h)(1) to include members of appellee's class—would nevertheless be in error.

> "Where a statute is defective because of underinclusiveness," Mr. Justice Harlan noted, "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."

Califano v. *Westcott*, 443 U.S. 76, 89 (1979), quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (concurring opinion).

The relief ordered by the district court in this case is inconsistent with the considered decision in 1974 by both the Joint Labor-Management Railroad Retirement Negotiating Committee and Congress to reject the recommendation of the Commission on Railroad Retirement that individuals in appellee's position be covered (see pages 12-13, *supra*). It would also have the effect of creating an enormous drain on the Railroad Retirement Account (or on general revenues reim-

bursing the Account) in contravention of the congressional purpose to restore the Account to financial soundness.

In our view, if the Court were to accept appellee's constitutional argument, the appropriate course here would be to strike the "windfall" benefit provisions in 45 U.S.C. 231b(h), except those in subsections (h)(1)(A)(iii) and (h)(3)(A)(iii), which authorize such benefits for individuals who had 25 years of railroad service by the end of 1974. Appellee concedes that it is not unconstitutional to provide windfall benefits to these individuals and not to the members of his class, because the 25-year employees may properly be regarded as career railroaders (see pages 33-34, *supra*). The provision of dual benefits under Section 204(a)(3) for persons who were retired and eligible to receive them by the end of 1974 (which appellee has likewise not challenged) would also be unaffected by this approach. The result would be to continue the payment of "windfall" benefits to the individuals who have the strongest equitable claim to them, therefore significantly furthering the congressional purpose underlying the grandfather provisions, while at the same time furthering the competing purpose of limiting the drain on the Railroad Retirement Account by reducing rather than expanding benefits.

The approach we suggest would not entail a judicial rewriting of the statute through the introduction of new eligibility criteria not expressly approved by Congress. Compare *Califano* v. *Westcott, supra,* 443 U.S. at 92-93; see also *id.* at 95 n.1 (Powell, J., dissenting). The eligibility for "windfall" benefits of persons already retired or with 25 years of service by the end of 1974 is expressly provided in the Act.

Moreover, the "windfall" benefits involved here are not ones Congress deemed essential in order to furnish a minimal standard of living for the beneficiary and his family (compare *Califano* v. *Westcott, supra,* 443 U.S. at 90, 92), as demonstrated by Congress' decision to eliminate dual benefits in the future. Thus, the equities do not weigh against enjoining the payment of benefits to persons Congress deemed eligible, as they did in *Westcott.* The relief we propose here, in the event the Court should hold that the exclusion of appellee from eligibility under 45 U.S.C. 231b(h) is unconstitutional, would preserve the limited resources in the Railroad Retirement Ac-

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1980

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count until Congress has an opportunity to reassess the relative equities of potential beneficiaries against the background of the financial requirements of the railroad retirement system. *Califano* v. *Westcott, supra,* 443 U.S. at 96 (Powell, J., dissenting).

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No. 79-870

In the
Supreme Court of the United States

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

vs.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

vs.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court For The Southern District Of Indiana.

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether the District Court erred in determining that Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h), violates the equal protection guarantees of the Fifth Amendment because it irrationally distinguishes between classes of similarly situated vested annuitants by depriving the members of one such class of their "dual benefits" solely because of the timing of their accrued railroad service.

STATEMENT OF THE CASE

The Statement of the Case of the Appellant, United States Railroad Retirement Board ("Government") is incomplete and somewhat misleading. The Plaintiff Class, therefore, provides this Court with the following Statement of the Case which is based upon the undisputed record made below:

I. HISTORICAL DEVELOPMENT OF RAILROAD RETIREMENT

The Railroad Retirement Act of 1937, 50 Stat. 307, the predecessor to the present statute, the Railroad Retirement Act of 1974, 45 U.S.C. §231 *et seq.* (hereinafter referred to as the "Act"), was established to remedy a number of deficiencies in the private pension plans of the railroad companies. Among these was "a feeling that company pensions were merely 'charity,' guaranteed no rights, and afforded no real degree of protection . . . ." COMMISSION ON RAILROAD RETIREMENT, THE RAILROAD RETIREMENT SYSTEM: ITS COMING CRISIS, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972), (hereinafter, "COMMISSION REPORT") Vol. II, Staff Papers, 13. A primary goal of the first effort at a retirement statute, the Railroad Retirement Act of 1934, 48 Stat. 1283 was to give railroad employees the certainty of a contract obligation and the assurance that their pensions would be paid in full as accrued. *Hearings on S. 3231 Before the Senate Committee on Interstate Commerce,* 73d Cong., 2d Sess. (1934) (Testimony of Herman L. Ekern), *reprinted* in COMMISSION REPORT, Vol. II, Staff Papers, 18. The 1934 Act was held unconstitu-

tional[1]; it was followed by the Railroad Retirement Act of 1935.

After that statute was also invalidated, *Alton R. Co.* v. *Railroad Retirement Board,* 16 F. Supp. 955 (D.D.C. 1936), the railroads and unions reached an agreement on the provision of pensions for railroaders. COMMISSION REPORT, Vol. II, Staff Papers, 25. That agreement became the Railroad Retirement Act of 1937. *See generally Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 574 n.3. (1979) Under the 1937 Act, employment before its effective date, for which there had been no contributions, counted towards pension requirements. Also, the 1937 Act did not require an offset for the receipt of Social Security benefits, so that a retiree could receive his full benefits from both programs. COMMISSION REPORT, at 58.

In 1951, Congress made two major changes by Pub. L. No. 82-234 (1951). First, it initiated an offset for any benefits which derived from credit given by both Railroad Retirement and Social Security for pre-1937 work for which the railroad employee could not have made contributions to either system. Before the 1974 Act, this was the only time that Congress eliminated a portion of a Railroad Retirement benefit which had previously been granted. Second, Congress initiated the "financial inter-

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[1] This Court held the 1934 Act to be unconstitutional not, as the National Railway Labor Conference ("NRLC") urges in its *Amicus* brief, at 8, 38, because it awarded pensions to persons who left the railroads before retirement, but, rather, because it forced the railroads to pay pensions to people for periods prior to the establishment of the fund, during which, of course, those people made no contributions. *Railroad Retirement Board* v. *Alton Railroad Company,* 295 U.S. 330, 349-50 (1935); *see Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 574 n.3 (1979).

change" between Social Security and Railroad Retirement. This required the Social Security Administration to make payments to the Railroad Retirement Board for the amount of benefits Social Security would have paid to railroad beneficiaries had they been covered by Social Security. Conversely, it required the Railroad Retirement Board to pay to Social Security an amount equal to the contributions Social Security would have collected had then-active railroad employees been obligated to contribute to Social Security. The purpose of the financial interchange was "to insure that the social security system would neither gain nor lose from the existence of a separate railroad retirement system," and to fund higher railroad benefits. COMMISSION REPORT, 62.

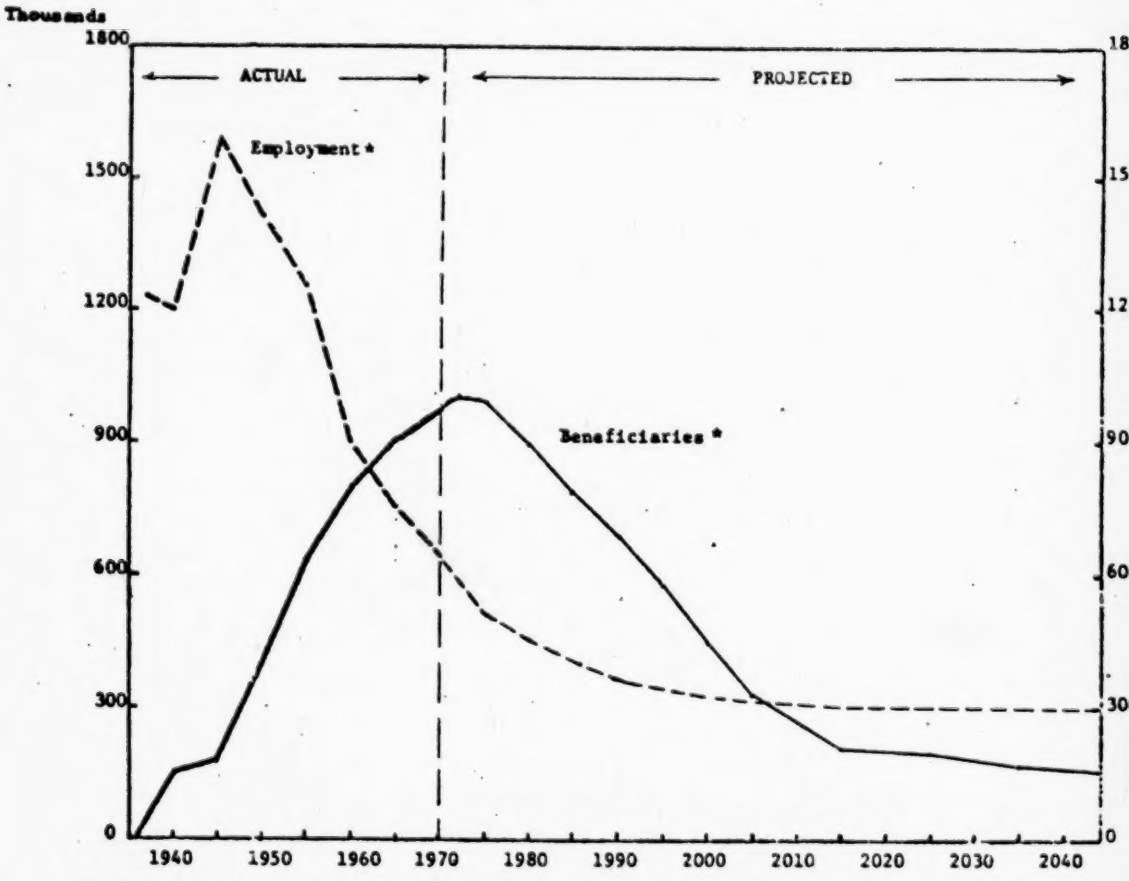
The 1951 "offset" deduction from railroad benefits was not received well by those railroaders whose pensions were thereby affected. In 1954, Congress repealed it, retroactive to 1951. Pub. L. No. 83-398 (1954). Among the reasons Congress gave for the repeal were several that are as applicable to the instant situation as to the previous one: railroad employees believed that benefits, once given, would not be withdrawn; it was inequitable to deny benefits to the many former railroaders who had been compelled to seek Social Security-covered employment by the loss of their railroad jobs; and the offset discriminated against a special group of former railroaders. *Report of House Committee on Interstate and Foreign Commerce,* H.R. Doc. No. 758, 83d Cong., 1st Sess., 6-9 (1953).

II. THE SPECIFIC DEVELOPMENT OF THE 1974 RAILROAD RETIREMENT ACT

Despite net payments of $5.9 billion by Social Security to the Railroad Retirement Fund via the financial inter-

change, it became apparent in the late 1960's that the Railroad Retirement system was underfunded. The actuarial deficiency was chiefly explained by the historic decline in railroad employment. When the Railroad Retirement fund was created in 1937, the railroad industry employed 1,280,000 people. By the first quarter of 1972, however, railroad employment had declined over 50% to 582,000 workers. COMMISSION REPORT, 10. Indeed, railroad employment is expected to continue to decline into the near future. *Id.* This historic decline in railroad employment contradicts the unwarranted assumption suggested by the Government and the NRLC that the Plaintiff Class deserted the railroads to take advantage of employment elsewhere. As a general rule, the Plaintiff Class did not leave the industry of their own will, but were forced, by changes in the industry, to look elsewhere.

At the same time that railroad employment was declining, persons who were active employees during the early years began to retire, thus increasing the number of beneficiaries. Today there are more persons receiving Railroad Retirement benefits than there are contributing to the Railroad Retirement fund. *Id.*, 12. The trend in employment and beneficiaries is shown by the following graph.



*Employment: average of 12 monthly figures; beneficiaries in current payment status on 12/31
Source: Actual data from Railroad Retirement Board, projected data from CRR compute
model.

COMMISSION REPORT, 13.

In 1970, Congress, concerned about the actuarial deficiency, established the Railroad Retirement Commission (hereinafter "Commission") to study the Railroad Retirement system and to recommend methods of making the fund actuarially sound. Pub. L. No. 91-377, 84 Stat. 791 (1970). To ensure an impartial and fully respected study, Congress directed that the Commission be composed of five members with only one railroad manage-

ment representative, and one railroad union representative; the other three were representatives of the public. *Id.,* §7(a) (1). The President of the United States appointed three of the members, the Speaker of the U. S. House of Representatives one, and the President Pro-Tem of the U.S. Senate one.

After an exhaustive study, the Commission submitted its report to Congress on June 30, 1972. One of its four principal recommendations was that *all* individuals fully vested in both Railroad Retirement and Social Security prior to the date of changeover to a new Railroad Retirement system have those dual benefit rights fully preserved.

> "2. Legally vested rights of railroad workers and railroad retirement beneficiaries to benefits based on social-security-covered non-railroad service should be guaranteed, but future accrual of these dual benefits should be stopped." COMMISSION REPORT, at 4 (1972) (emphasis in original). *See also id.,* at 368.

In the extensive elaborations upon this recommendation contained in the body of the COMMISSION REPORT, the Commission repeatedly emphasized that dual benefits should be phased out, but made it equally clear that entitlement to dual benefits should be fully protected for retirees already receiving them and for those like Plaintiff's Class whose rights had already vested. The Commission's final determination was thus the protection of all vested rights, regardless of other indices of employment. *E.g.,* COMMISSION REPORT, 21, 156, 344, 369.

Following receipt of the Commission's extensive and thorough report, Congress then directed railroad management and labor to negotiate and prepare a bill to restructure the Railroad Retirement system to make it

actuarially sound. Pub. L. No. 93-69 §108, 87 Stat. 162 (1973). Congress did not call upon the railroad industry to enhance existing retirement benefits, and it explicitly directed the negotiators to "take into account the specific recommendations of the Commission on Railroad Retirement." Pub. L. No. 93-69 §107(c) (1), 87 Stat. 162 (1973).

Unfortunately, this time there was no representative of the public appointed to participate in or even monitor the executive sessions between rail management and labor as they worked a negotiated exclusion of the Plaintiff Class in contradiction to the Commission's objectives. Indeed, Congress allowed rail management and labor to make their own appointments of negotiators from their active ranks without the review or consent of Congress. Pub. L. No. 93-69 §107(a), 87 Stat. 162 (1973). These negotiators, known as the Joint Labor-Management Negotiating Committee (hereinafter referred to as the "JLMC"), thus included no representative of the public and no direct representative of those ex-railroaders, the Plaintiff Class, whose vested rights were ultimately to be emasculated. The members of the Plaintiff Class simply had no voice in the negotiation process other than that of the railway labor members of the JLMC whose interests turned out to be antithetical to the Class.

Anticipating Congress' directive, the negotiators first met on October 24, 1972, at which time C. L. Dennis (the labor member of the Commission), on behalf of the railway labor unions, issued an opening statement on labor's position, emphasizing strong support for retention of all earned dual benefits of past and present railroaders, including, of course, those of the Plaintiff Class. He reacknowledged that this was one of the four principal recommendations of the Commission. *Deposition of Hollis G. Duensing, Custodian of Records, American Asso-*

ciation of Railroads, January 11, 1979 (hereinafter "*Duensing Deposition*"), Exhibit F. Also, he urged the adoption of a simple pension formula which all prospective pensioners could understand and use to compute their own annuities without the aid of expert actuaries. Underlining the importance of the Commission's recommendation to retain existing earned dual benefits, he noted as well the equitable basis for not treating those who had previously served in the railroad industry any differently than those who were now in that industry:

> "The Human Factor involves the hundreds of thousands of [former railroad] employees who have been *laid off-furloughed-dismissed* or *separated* from the industry, many in their 50's and 60's with 20 to 40 years of service in the railroad industry to their credit. All of these people had planned on a Railroad Retirement Pension under the Railroad Act. . . ." *Duensing Deposition,* Exhibit F. (emphasis in original) (bracketed material added here and in all following quotes for clarity of understanding).

As later events demonstrate, however, the only principal Commission recommendation *not* followed by the JLMC was that which protected the rights of all vested dual beneficiaries, including the Plaintiff Class.

The starting point for the negotiators was a fund deficit at the beginning of 1974 which was estimated at nine percent of taxable payroll. S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News, 5702, 5703. Recognizing the Commission's specific recommendation and labor's announced position, the JLMC management negotiators initially agreed to protect all "vested rights," which included those of the Plain-

tiff Class. *Deposition of William L. Burner, Jr., Custodian of Records, National Railway Labor Conference, January 11, 1979* (hereinafter *"Burner Deposition"*) Exhibit E. *Duensing Deposition, Exhibit O; Burner Deposition,* Exhibit I. But contrary to the direction of Congress, the labor negotiators, through C. L. Dennis, the former labor member of the Commission, commenced demanding increases in certain of the existing benefits, despite the fund's already recognized actuarial deficiency. These increases[2] amounted to an additional three percent deficit in the retirement fund, a funding condition precisely contrary to the purpose of the negotiations.

The JLMC resolved the original nine percent deficit, which had been the cause of congressional alarm in the first place, through the restructuring of the benefit formula and the receipt of funds from Social Security (later the general fund). *Burner Deposition,* Exhibit J (letter of April 10, 1974 to Sen. Williams from JLMC, at 9); *see also* 120 Cong. Rec. 18391 (daily ed. June 10, 1974).

Additionally, the JLMC resolved the newly proposed add-on three precent deficit suggested by the labor members as the cost for increased benefits. This new three percent was funded by an explicit JLMC decision to disavow the Commission's recommendation that all vested beneficiaries have their rights protected. The JLMC specifically and intentionally decided to eliminate the dual

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[2] The demanded increases were the following: (1) full regular and supplemental annuity benefits at age 60 to those retiring with 30 years of service, 45 U.S.C. §§231a(a)(1)(ii), 231a(b)(1)(i); (2) full spousal benefits at age 60 for spouses of employees with 30 years of service, 45 U.S.C.. §231a(c)(1)(i)(B); (3) and an increase in benefits guaranteed for widows and other survivors from 110 per cent of comparable social security benefits to 130 per cent, 45 U.S.C. §231c(g).

benefits of the Plaintiff class,[3] that is, those former railroaders who had left the railroads—and interestingly enough, the unions. Thus a *quid pro quo* was worked; higher benefits demanded by the unions were made possible by eliminating the vested rights of the Plaintiff Class who no longer had an active voice in union affairs. As Mr. Dennis stated during the critical JLMC negotiations:

> "Mr. Dennis [at the JLMC meeting, after the proposed elimination of the vested rights of the Plaintiff Class had been presented]: . . . keep the current law in effect with certain changes which come to about 3%, but savings to the plan come to a lot more on the deficit picture. The dual benefits and other things would save a lot more than the new benefits

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[3] The District Court defined the Plaintiff Class as follows:

"2. Fritz is the duly certified class representative plaintiff in this cause of action of a class of persons who have all the following attributes:

(a) Its members did not have a current connection with the railroad industry as of December 31, 1974, nor did such members work for the railroad industry in calendar year 1974;

(b) Its members had less than 25 years but more than 10 years of credited railroad service as of December 31, 1974;

(c) Its members were not receiving Railroad Retirement benefits as of December 31, 1974;

(d) Its members filed applications for Railroad Retirement annuities after December 31, 1974;

(e) Its members were entitled to the receipt of such annuities beginning on or before January 31, 1977;

(f) Its members have been determined to be entitled to Railroad Retirement annuities and Social Security benefits but not to a so-called 'windfall' amount as computed under Section 3(h) of the Railroad Retirement Act of 1974." 45 U.S.C. §231b(h), Jurisdictional Statement, at 2a.

would cost." *Burner Deposition,* Exhibit I (March 19, 1974 JLMC meeting).

Later the Senate Report on the Act unwittingly confirmed the apparent trade off:

> "It should be noted that these reductions in future payments are offset in part by three liberalizations in benefits designed to make fully effective the early retirement provision which was enacted last year. The three liberalizations which the bill would provide have a level cost of 3.1 percent of taxable payroll. . . ." S. Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Ad. News, at 5705. See also *infra* at 36-37, 39.

At no time were affected former railroaders (Plaintiff Class) notified that their dual benefits would be eliminated. Indeed, even as the JLMC was subverting the Commission's recommendation and eliminating the Plaintiff Class' vested rights, it was simultaneously stating in a number of publications that the proposed legislation would not harm anyone's entitlement to his or her vested dual benefits:

> "The [Railroad Retirement Study] Commission and the unions agree completely that the pension changeover will be completed '*without taking away any present benefits from current beneficiaries, or any legally vested benefits from the present workers.*'
>
> "The clear principle is: everybody benefits, nobody gets hurt. . . .
>
> "Q. What about dual benefits?
>
> "A. The Commission recommended that everyone who presently has vested rights to dual benefits (10 years under Railroad Retirement and necessary credits under Social Security) will get them on retirement, just as at present, and that those who are

not vested will not be able to acquire dual benefits. Railway Labor will attempt to expand on this to protect everyone's interest in dual benefits. *Duensing Deposition,* Exhibit C, (*United For Pension Reform: Railway Labor's Major Struggle To Improve Railroad Retirement In 1973,* at p. 3, col. 1, and p. 7, col. 1.) (emphasis in original).

. . .

"*Phasing-out of Dual Benefits*—a key section [of the 1974 Act] would gradually phase-out dual benefits which now permit retirees to receive both a social security and a railroad retirement pension. However, all who presently receive such benefits and workers who qualify for them prior to January 1, 1975, will not be affected and will continue to receive such benefits. *Duensing Deposition,* Exhibit C, (*Legislative, Negotiating Campaigns Ahead,* Railway Clerk, July 1974 Blueprint for Pension Progress, at p. 1 para. 5).

. . .

"It would do so by gradual phase-out of the 'dual' benefits now payable to many railroaders under both the Railroad Retirement and Social Security system; by revisions in the formula for computing future benefits; by a shift of the cost of 'dual' benefits during the phase-out period to Social Security, and by a number of other changes. This would be accomplished by protective arrangements which guarantee higher benefits for those retiring in the next three years, and no loss in benefits for anyone retiring in the next eight years." *Duensing Deposition,* Exhibit C (R. Porter, *Your Washington Reporter,* Railroad Yard Master, May, 1974).

There is no evidence to indicate that the Railroad Retirement Board or its field offices informed any member of the class about the potential reduction in earned benefits during the time that Congress was working on the 1974 Act. Even when members of the Plaintiff Class

asked, they were not warned that they could take steps to preserve their earned dual benefits by early retirement before the effective date of the Act. *E.g., Affidavit of Harry D. Boyd,* filed as part of the class members' Sworn Answers to Interrogatories on December 22, 1978.

On April 10, 1974, the JLMC presented its proposed bill to the congressional sponsors, Senator Williams and Congressman Staggers. *Duensing Deposition,* Exhibit Q; *see also* 120 Cong. Rec. 18391. At the same time, the JLMC distributed a news release, which again disguised the disenfranchisement of the Plaintiff Class:

> "A principal recommendation of the joint rail-union group relates to dual benefits. The Commission on Railroad Retirement recommended that these benefits be phased out gradually in order to protect existing employees and beneficiaries. The joint rail-union group agreed in general with this recommendation." *Duensing Deposition,* Exhibit Q.

Later, in the congressional hearings on the JLMC's draft bill, members of the JLMC were less than candid with Congress when questioned on the adverse effects, if any, their proposed bill might have upon present or future retirees. See *infra* at 31-35.

After the legislative hearings, the Railroad Retirement Act of 1974 was passed on September 30, 1974, without change from the draft bill insofar as it affected Plaintiff's Class. At no time during the hearings did Congress even imply an understanding that it was eliminating a vested benefit of the Plaintiff Class. The bill was then sent to President Ford. On October 12, 1974, President Ford vetoed it, commenting on the failure of Congress to provide an understandable formula for computing one's retirement pension. 120 Cong. Rec. H10546 (Oct. 15, 1974).

That veto was overridden, and the bill became law on October 16, 1974.

Under the Act as drafted by the JLMC and thereafter passed by Congress, full dual benefits were awarded in a manner so as to protect all previously vested present and future beneficiaries except for those former or so-called inactive railroaders comprising the Plaintiff Class. The Plaintiff Class was intentionally eliminated by the JLMC by structuring a special, new formula for vesting which "hit" or "eliminated" only the Plaintiff Class among all railroaders who had made their required retirement contributions and had served 10 years on the railroads by the effective date of the Act, and who had completed ten years of service under Social Security as of December 31, 1974. This was done by additionally, and for the first time, requiring that such vesteds also have (i) performed railroad service at some time during calender 1974, or (ii) have a current connection with the railroad industry as of December 31, 1974, or upon retirement, or (iii) have completed 25 years of railroad service as of December 31, 1974. Thun, the Plaintiff Class who had served the required 10 years was excluded from the dual benefits and treated differently than its similarly situated vested annuitants by the JLMC-added "timing" requirements that the beneficiary have a current connection with the industry in 1974 (or the date of retirement), or have worked for the railroad at some time in calendar 1974.

Immediately after the Act passed, the Railroad Retirement Board distributed a news release which pointed out the increased retirement benefits but camouflaged the loss the members of the Plaintiff Class had suffered. In fact, the release states that all persons vested before the ef-

fective date would have their previously earned dual benefits protected:

> "*Dual Railroad Retirement-Social Security Benefits*
> "One of the most important changes made in the railroad retirement system effects the gradual phase-out of dual benefits. Under the previous law an annuitant could receive separate railroad retirement and social security benefits on the basis of his respective earnings under the two systems.
> "However, employees who retired before the changeover date of January 1, 1975, will still continue to receive at least the same amounts of railroad retirement and social security benefits they were receiving before changeover. Also, *employees retiring after changeover who were fully vested for both railroad retirement and social security benefits before the changeover will receive an additional amount in the tier II portion of their annuity, generally referred to as a 'windfall' amount.*" (Document 23 to Defendant's Response To Plaintiff's Request For Admissions, filed February 9, 1979) (emphasis added).

It was only sometime after the passage of the Act that various Plaintiff Class members, upon inquiry at different field offices of the Board, learned the truth — that they had lost a substantial part of their previously vested dual retirement benefits.

From the beginning of the Commission's investigation, it was evident that dual benefits were a factor in the fund's actuarial problems. But at the same time the Commission recognized the inequity of ignoring vested rights. And early on, even the JLMC paid lip service to that principle, in view of the significant reliance which many individuals had placed on the receipt of dual benefits.

> "Mr. Dempsey: . . . The [dual] benefit is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely

> as of January 1, 1975. *But we cannot do that — we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.*" *Burner Deposition,* Exhibit I (March 18, 1974, JLMC meeting) (emphasis added).

Despite this announced position, the JLMC, as mentioned above, thereafter ignored the principle precisely so that they could provide higher benefits to others. The existing actuarial problems of the Fund were resolved by various methods, including the elimination of prospective dual-benefit rights. Thus, the classification of the Plaintiff Class was an intentional effort to treat them differently than other vested beneficiaries. The JLMC undertook that effort, and, to further it, put out misleading and inaccurate press releases, capped with misleading colloquies with the congressional committees during the hearing procees. The net result was a statute which listed as its principal purposes the inclusion of the Plaintiff Class for vesting purposes but which thereafter followed by specific and very complex language the carefully reasoned approach of the Commission in virtually every way — *except* in its payment of higher benefits to some and its refutation of the vested rights of the Plaintiff Class as a consequence.[4]

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[4] This 1974 refutation of vested rights in the railroad system is especially ironic in light of the almost simultaneous passage of the Employee Retirement Income Security Act ("ERISA"), which became law only one month before the passage of the Act, on September 2, 1974. One of the principal purposes of ERISA was to require minimum vesting conditions in private pension plans *e.g., Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307, 310-311 (8th Cir. 1979) (and the legislative history cited therein). Minimum vesting was accomplished so that, in most instances, ten years of service would fully vest a worker for coverage. 29 U.S.C. §1053. As this Court recently noted: "One of Congress'

SUMMARY OF ARGUMENT

For the special discrimination against the Plaintiff Class to survive this Court's scrutiny, that discrimination must rationally relate to the objects of the Act. The starting point of this Court's analysis is the actual statutory class created and not an atypical example within such class. Here, the Plaintiff Class is a class of persons, otherwise vested under both railroad retirement and Social Security, which was specifically singled out, as a class, for disparate treatment. Because they were selected as a specific group to be sacrificed, the Plaintiff Class is not merely an unfortunate, but justified, anomaly. It was, rather, specifically created by the Act. Therefore, discrimination against its members must rationally be related to the goals of the Act.

The declared, actual goals of the Act were to reduce the railroad retirement fund's actuarial deficiency and to guarantee the rights of those persons vested under the previous law. Neither of these goals was served by the discrimination vested upon the Plaintiff Class.

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[4] (Continued)
central purposes in enacting this complex legislation [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman* v. *Pension Benefit Guaranty Corporation*, ... U.S. ....., 48 U.S. L.W. 4524, 4528 (May 13, 1980) (footnotes omitted). Ironically, the original intent of providing a railroad retirement annuity was to ensure that railroaders would not be subject to the vagaries, inconsistencies, and unreliability of the private pension system. See *supra*, at 2. With the passage of ERISA, however, all other members of private industry have received basic protection of their pension rights through minimum vesting standards. Yet those railroaders, comprising the Plaintiff Class, now have had vested rights repudiated as a result of the 1974 Act.

The fiscal goal of the Act was not related to the discrimination against the Plaintiff Class because, first of all, the financial problems of the fund were resolved by other revisions, not necessitating the sacrifice of the Plaintiff Class. The need to eliminate the Plaintiff Class only became necessary when the JLMC agreed to increase the benefits to others. Were it not for the increased benefits inserted into the Act by the JLMC, no loss of anyone's vested benefits would have been needed. Secondly, and of equal importance, even if some higher adjustments were arguably permissible, which they are not, the discrimination against the Plaintiff Class was irrational, because the distinction made between the Plaintiff Class and those other persons similarly situated but who did not lose their vested benefits was based solely upon *when* a person performed his railroad service (timing of service) and not the *length* of that service or some other possibly rational criteria. A person's fortunate or unfortunate work with the railroad industry on an arbitrarily selected date, especially a date after he has performed his required length of service and has performed all required vesting criteria, has no rational relationship to the fiscal objectives of the Act. The Government's and the JLMC's attempts to justify the discrimination as based on so-called "career" service or loyalty to the industry are nonsensical since the Plaintiff Class and those persons protected are in all respects the same except for *when* they had performed their required railroad service.

The discrimination against the Plaintiff Class was, of course, antithetical to the Commission's purpose and Congress' purpose of protecting all vested beneficiaries. The JLMC-prepared bill, depriving the Plaintiff Class

of their benefits, passed congressional scrutiny only because the testimony of the JLMC representatives misled Congress as to the adverse effects the Act had on the Plaintiff Class.

Then too, the reliance of the Plaintiff Class on the anticipated receipt of their dual benefits and the severe impact of the loss of these benefits upon the Class' standard of living and their plans for retirement, emphasized the arbitrary nature of this denial of equal protection.

The discrimination against the Plaintiff Class is also unconstitutional because that discrimination constitutes the unwitting congressional sanctioning of the railroad labor unions' breach of their fiduciary duty to the Plaintiff Class. Although labor unions otherwise would have no duty to the Plaintiff Class since the Plaintiff Class' members are no longer affiliated with the unions, the unions assumed such a duty by undertaking to represent the Plaintiff Class' interest in their negotiations with railroad management over the drafting of the Act. As the evidence revealed, the labor unions explicitly permitted the Plaintiff Class to be sacrificed in exchange for higher benefits for its membership. The union was, however, unauthorized to trade off the vested benefits of the Plaintiff Class. The Congress' unwitting authorization of the union's breach of their duty to the Plaintiff Class also rendered the Act unconstitutional.

Finally, the Government's argument that even if the Plaintiff Class has been denied equal protection, the relief accorded in the District Court was improper, is asserted too late and is without merit. The complaint is untimely because it was not raised at any time over the three-year course of this case's progress through the Dis-

trict Court nor was it raised in the Government's Jurisdictional Statement. This belated complaint is also without merit because the purpose of the Act was to protect *all* vested beneficiaries. The Government, now essentially conceding the weakness of the case on the merits, inappropriately seeks to have this Court rewrite the Act so as to thwart that Congressional purpose.

ARGUMENT

I. THE ELIMINATION OF VESTED BENEFITS TO THE PLAINTIFF CLASS REPRESENTS INVIDIOUS DISCRIMINATION IN VIOLATION OF THE GUARANTEES OF EQUAL PROTECTION

A. Under the rational basis test, the classificatory scheme must rationally further a legitimate governmental interest.

The Plaintiff Class does not allege, nor did the District Court conclude, that either a suspect class or a fundamental right is involved in this case; instead, the issue confronting this Court is whether the Plaintiff Class has been denied equal protection pursuant to the "rational basis test."[5] This Court has defined that standard as follows:

> "[A]n individual's right to equal protection of the laws does not deny the power to treat different classes of persons in different ways; it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

[5] Since an Act of Congress is at issue, plaintiffs assert their rights under the Fifth Amendment's due process clause. While that Amendment does not have an explicit equal protection provision, that guarantee is implicit within the due process clause. *E.g., Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1964).

alike." *Johnson* v. *Robinson,* 415 U.S. 361, 374-75 (1974) (citations and quotes omitted).

Moreover, a statute's objectives are those objectives announced by Congress, not those invented retroactively:

> "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 648 n.16 (1975). *Accord, Califano* v. *Goldfarb,* 430 U.S. 199, 212-13 (1977).

Although the rational basis standard is the less rigid standard of constitutional scrutiny, it is not a "toothless one." *Mathews* v. *Lucas,* 427 U.S. 495, 510 (1976); *Califano* v. *Aznavorian,* 439 U.S. 170, 175 (1978). Thus, even though this court has held that Railroad Retirement benefits are noncontractual, *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 575 (1979), any discriminatory treatment of one class of recipients in favor of another can only be effected with due regard to the precepts of equal protection.

The Plaintiff Class here seeks the now-deprived benefits not because their needs may be greater than those who were protected, but rather because the members of the Plaintiff Class paid their contributions into the railroad retirement system just as did the protected railroaders. In addition, the Plaintiff Class met and performed all requirements of law for the vesting of these benefits during 10-25 years tenure on the roads. Railroad benefits must not therefore be arbitrarily redistributed from the Plaintiff Class to those receiving higher benefits without a sufficient and proper justification. *Weinberger* v. *Wiesenfeld,* 420 U.S. at 647 (1975).

B. The classificatory scheme explicitly established a class whose members, alone among beneficiaries vested on the Act's effective date, are denied dual benefits.

The starting point of equal protection analysis is the actual statutory classification. *Califano* v. *Boles,* 443 U.S. 282, 293-94 (1979); *Califano* v. *Jobst,* 434 U.S. 47, 50 (1977). This Court has held that equal protection review of a statutory discrimination must be judged by reference to the classification actually adopted and not by atypical examples within the broad legislative classes. *Califano* v. *Boles,* 443 U.S. 282, 294 (1979); *Califano* v. *Jobst,* 434 U.S. 47, 55 (1977).

The Plaintiff Class is a class of Railroad Retirement beneficiaries specifically denied entitlement to dual benefits by the Railroad Retirement Act of 1974. 45 U.S.C. §231b(h)(1). They are not atypical members of any statutorily created class, but are, rather, a distinct class created by the statute. The history of the creation of this class, as well as the language of the Railroad Retirement Act, demonstrates the statutory recognition of the Plaintiff Class as a separate and specific class of Railroad Retirement beneficiaries.

Until the JLMC presented its draft bill to Congress, the Plaintiff Class members were considered no different than other non-retired, vested railroaders. The Commission saw no distinction between the Plaintiff Class and those protected; it explicitly recommended that although dual benefits should be phased out, rights vested by the effective date should continue to be recognized. COMMISSION REPORT, at 4, 368. Lest there be any confusion, the Commission carefully defined the concept of "vesting":

> "*Legally vested.* As used in the text of this report, legally vested benefits refers to the status of currently or fully insured railroad workers under social security as of the transition or changeover date to a new two-tier railroad retirement system, with respect to their entitlement to a guaranty of their OASDI dual benefits accrued before the date of changeover.
> "*Vested benefit.* A benefit the payment of which is not contingent upon a participant's continuation in specified employment;
> "*Vesting.* The attainment by a participant of a benefit right attributable to employer contributions, not contingent upon the participant's continuation in specified employment. In the RR system an employee is fully vested when he obtains 120 creditable service months." COMMISSION REPORT, 552, 555.[6]

Thus, the Commission viewed both the Plaintiff Class and those protected as "vested" because both had sufficient service under Railroad Retirement and Social Security to be fully insured, and were fully insured, prior to the effective date of the Act.

Of course, prior to the passage of the 1974 Act, the Government had always viewed the two groups as one class. That perception is demonstrated, for example, by the Railroad Retirement Board's November 30, 1973, memorandum supplying the actuarial information on earned dual benefits requested by railroad management. *Burner Deposition,* Exhibit B. In that memorandum, the Board speaks of only one class of persons with "vested" rights (*i.e.,* 120 months of railroad service plus sufficient

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[6] As Justice Stewart recently defined it: "[I]n the pension field a benefit is usually said to 'vest' when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service." *Nachman* v. *Pension Benefit Guaranty Corporation,* 48 U.S. U.S.L.W. at 4533 (dissent).

Social Security service); no importance is there attached nor even any comment made as to an employee's current connection to, or fortuitous employment in calendar year 1974 or at the time of retirement, with the railroad industry. Furthermore, as shown by the rail industry's January 28, 1974, Listing of Essential Elements [For Negotiation], no distinction between the two groups was made by rail management or labor at this early stage of their 1974 "negotiation" meetings. *Burner Deposition,* Exhibit E. Either a railroader was "vested" based on 10-25 years service and his contributions to the retirement fund prior to the effective date of the Act or he was not; no distinction based upon his "present" status with the industry or upon retirement was initially discernible because no such distinction had ever existed.

Toward the conclusion of their negotiations, however, the JLMC created a distinction between the Plaintiff Class and the protected class. The JLMC made that distinction by adding new alternative conditions to the concept of vesting, which had the effect of excluding the Plaintiff Class from that previously established status. Even though all railroad employees had always been considered "vested" if they had paid in their monies and had sufficient qualifying service under both Railroad Retirement (120 months) and Social Security,[7] the JLMC redesigned vesting to accomplish specifically its purpose of eliminating the Plaintiff Class from coverage. Thus, in addition to the standard meanings associated with vesting, the JLMC invented other, unrelated conditions never men-

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[7] Generally, a person is considered "fully insured" under the Social Security Act upon meeting a ten-year requirement, but it is less in some circumstances. 42 U.S.C. §414(a).

tioned by the Commission whose principal recommendations they were supposedly to implement:

> "b. *Inactive Employees Not Dually Vested on Leaving Railroad Industry.* For an employee who (i) as of *December 31, 1974* has had less than 25 years of railroad service, (ii) does not as of *December 31, 1974 or the date of his retirement* have a current connection with the railroad industry, (iii) does not have railroad industry service *in* 1974, and (iv) at the end of the year in which he last worked for the railroad industry had not had sufficient quarters of coverage to qualify for a Social Security benefit, no dual benefit will be provided." *Burner Deposition,* Exhibit O, JLMC's April 12, 1974, Fundamental Principles, at 7 (emphasis in original).

Finally, the written statement of William Dempsey, chief management JLMC negotiator, which was incorporated into his Congressional testimony only by reference, shows that the Plaintiff Class was singled out, as a specific group, for discriminatory treatment.

> "The second group [the Plaintiff Class] would be comprised of employees, who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly, under the bill they would not receive a windfall dual benefit, upon retirement unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refund in excess employment taxes paid)." *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 168-69 (1974).

Of course, Dempsey failed to tell Congress that the protected class of 10-25 year railroaders had failed to "remain" with the railroad industry for any period of time *longer* than the discriminated class. Their time qualification for vesting was 10 years, the same as Plaintiff's Class. Moreover, Dempsey made no explanation of his bald conclusion that the Plaintiff Class had a "lesser equitable" claim — obviously because he could not logically explain such a distinction.

The JLMC thus specifically contradicted the Commission's definition and major recommendation to guarantee all vested rights established by the effective date. By adding the "current connection" and "work-in-1974" rules, the JLMC carved out a distinct class, who, alone among those with vested rights, were disenfranchised. Members of the Plaintiff Class were thus not the unintended victims of an arbitrary line-drawing scheme. *E.g., Weinberger* v. *Salfi,* 422 U.S. 749, 781-85 (1975); *Califano* v. *Aznavorian,* 439 U.S. 170, 174-75 (1978). Rather the Plaintiff Class was specifically selected by the JLMC for this treatment. It is not an atypical group, but a specific class to whom equal protection analysis is singularly appropriate. *Califano* v. *Boles,* 443 U.S. 282, 294 (1979).

C. The expressed purpose of the Commission and of Congress, to protect all vested beneficiaries, was subverted by the JLMC, whose goal was different.

As previously noted, the rationality of a legislative classification must be judged in light of the legislative purpose of that classification. Two independent sets of goals supported the Railroad Retirement Act of 1974, the goals of the Congress and the goals of the JLMC i.e., the leaders of railway management and labor.

Congress' purposes were unquestionably expressed in the Senate and House Reports on the Act. The Senate Report states as follows:

> "Principal Purpose of the Bill
>
> "The bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis. . . .
>
> "Persons in receipt of both Railroad Retirement and Social Security benefits as of December 31, 1974, will continue to receive benefits under both systems without any reduction in those benefits. *Persons who already have vested rights under both the Railroad Retirement and Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law.*" S. Rep. No. 93-1163, 93d Cong., 2d Sess., (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702 (emphasis added). See also *id.*, at 5710.

The House expressed the *same* purposes with *identical* language. HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, RAILROAD RETIREMENT ACT RESTRUCTURING, H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2 (1974).

In short, Congress sought: (1) to make the Railroad Retirement Fund actuarially sound and (2) to guarantee the rights of those vested under previous law, which necessarily included those in the Plaintiff Class. These objectives, of course, dovetail precisely with the recommended objectives of the Commission which had intensely studied the matter for two years prior to the appointment of the JLMC. *Supra* at 7, 24-25.

The congressional purpose to protect completely the benefits of all railroaders vested by the effective date of the Act was not, as the NLRC in its amicus brief alleges,

refuted by any intended congressional action. In attempting to show a congressional desire to exclude the Plaintiff Class, the NLRC refers merely to matters drafted by the JLMC, not by Congress.[8] From the legis-

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[8] The NRLC at 27-28, and the Board at 44, argue that Congress' knowledge of the effects that the Act had upon the Plaintiff Class was obvious from the Act itself. A reading of section 3(h)(1) and (2) proves that conclusion false. Nowhere within those sections does the Act point out that a previously vested class of beneficaries will be divested. Section 3(h) is perhaps the most confusing section of the Act, of which President Ford said the following:

"Furthermore, the provisions of the benefit formula are so complex that they would be extremely difficult to administer and virtually impossible to explain to the persons who are supposed to benefit from it." 120 Cong. Rec. H10546 (Oct. 15, 1974).

President Ford's remarks are here on point. Of course this complexity is also contrary to Labor's goal of arriving at a simple formula for vesting which all can understand. This was emphasized in Labor's opening statement at the start of negotiations on the bill. *Supra* at 9. The Railroad Retirement Board has discussed the Act's complexity in these terms:

"A former Chief Actuary of the Board even commented that the railroad retirement system is so complex that it virtually defies description. The new law which became effective January 1, 1975, increased the complexity. . . ." RAILROAD RETIREMENT BOARD, ANNUAL REPORT 1976, at 57.

Moreover, the complexity is demonstrated by the Board's form letter 701 prepared in March 1975, and routinely sent for months afterwards to those pensioners who retired after the 1974 Act became effective:

"The Board is unable at this time to compute and pay annuity awards for employees or spouses *under the Railroad Retirement Act of 1974.* Provisions of the new law are *extremely complicated,* and *it will take some time before we can implement all of its provisions.* In order to award you some type of benefit, it was necessary to compute your retirement annuity under the provisions

lative history, it is evident that Congress expected the Plaintiff Class, like all vested potential beneficiaries, to be protected. Congress reiterated this comprehension in other parts of its report on the Act as well:

> "But the Commission also was of the view that any plan to eliminate those dual benefits should include protection of the equities of existing beneficiaries and employees with claims upon such benefits. Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." *RAILROAD RETIREMENT ACT RESTRUCTURING: REPORT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

Not only did Congress desire to protect the dual benefits of all vested beneficiaries, but it was unfortunately led, by the testimony of JLMC members, to believe that it had done so. On this point there can be no equivocation:

> "Mr. Dingell [Congressman, D. Mich.]: Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?"
>
> "Mr. Dempsey [William Dempsey, Chairman, National Railroad Labor Conference and Chief Management Negotiator of the bill]: Well, I don't think so really. I think this is the situation in which everybody wins. Let me explain. . .
>
> "Mr. Dingell: Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I ap-

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[8] (Continued)
of the previous law. Your annuity will be reexamined as soon as possible and if you have an additional amount due, you should receive it by September 1, 1975. Any increase due you will be made retroactively, so no benefit will be lost." Railroad Retirement Board Form Letter 701 (3-75) (emphasis added).

plaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going to cost less but pay more benefits. Now if you have accomplished this, I suggest we should put you in charge of the social security system.

"Mr. Dempsey: Let me go back once again. I recognized that this is very complicated. It took me a long time to understand why a new benefit formula that would produce at least in the near future slightly higher benefits than the old one, could possibly save the fund a significant amount of money.

"Now let me try it again." Restructuring of the Railroad Retirement System: *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 199, 201 (1974).

* * *

"Mr. Dempsey: . . . This part of the top is the cost of the gradual phaseout of dual benefits, that is, *the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected.* So this is the cost of that social production for this group of dual beneficiaries, and the question, the fundamental question it seems to us is, is that a Federal responsibility or is that cost to be fastened on the railroad industry?" *Restructing on the Railroad Retirement System: Hearings on H.R. 15301 Before the House on Interstate and Foreign Commerce,* 93d Cong., 2d Sess., 213-14 (1974) (emphasis supplied).

* * *

"Senator Hathaway: We could cut down the amount of the contribution, changing the cutoff. We could say 11 years instead of 10, as far as vesting is concerned.

"Mr. Dempsey: Yes.

"Senator Hathaway: Or in age in number of years. "Mr. Dempsey: Yes; you can do it both ways. I think the problem here is to find a standard that people in general will regard as fair. You will always have someone who is a little short of the line, and he will always feel that they did something different. Once you depart from what the law prescribes in terms of the qualifying years, of course, then you do have trouble. You can always say that as long as you stick to 10 years for railroad retirement, or however many years for social security, then say to that man, well, we are sorry, but this is really what the law did provide, and if we went any place other than what the law requires, then we would have an argument on where do we stop, or how far should we go. *It seems to me the most logical approach that people will determine is fair is to stick to the vesting requirements of the two respective systems.*

"Senator Hathaway: Thank you very much Mr. Dempsey. We have no further questions." *Restructuring of the Railroad Retirement System, 1974, Hearings Before the Senate Committee on Labor and Public Welfare*, 93d Cong., 2d Sess. 334 (1974) (emphasis supplied).[9]

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[9] The NRLC has attempted to mitigate the impact of Mr. Dempsey's obvious misstatements to Congress by characterizing his comments as "generalized statements" or a "generalized discussion of key issues" regarding the matter of dual benefits. NRLC Brief, at 29. These statements were not general; they were specific responses to questions which should have caused Mr. Dempsey to disclose the effect that the legislation would have upon the Plaintiff Class rather than cover-up such an effect. The questions which were asked by Congress clearly told Mr. Dempsey that Congress understood that *no one* would lose a vested benefit by the proposed legislation. No fair reading of these matters can lead to any other conclusion. Mr. Dempsey failed to seize any of several opportunities to make either a candid or correcting disclosure to the Congress with regard to the elimination

As if the above deception were not enough, the hearing testimony additionally reveals that Mr. Dempsey flatly stated in testimony before the Committee that the Plaintiff Class was unequivocally covered:

> "Mr. Skubitz: [R-Kansas] Mr. Dempsey, one other question first. As we increased the social security retirement payment to people that are on retirement and in turn raised the tax in order to take care of the increase, have more funds been taken out of the railroad retirement program?
>
> "Mr. Dempsey: Every social security increase has had a sharply adverse impact on the railroad retirement fund because of the dual benefit problem. It would have no effect, it would be a wash, except for the dual benefit situation.
>
> "Let me now indicate briefly what the bill provides with respect to the dual benefit problem. It provides in substance two things. First of all, the parties agreed with the Commission on Railroad Retirement that the windfall dual benefits were inequitable and should be terminated. *At the same time, the parties agreed with the Commission's recommendations that this would have to be done in a manner that would protect the equities of existing employees.*
>
> "Basically, there are two classes of employees that the Commission believed and the parties believed that are entitled to equitable consideration because they have taken the law as they found it. The first are the beneficiaries on the retirement rolls who are receiving dual benefits under the bill. Those people would con-

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[9] (Continued)
of the vested benefits of the Plaintiff Class. He did not and he unquestionably misled Congress in this respect. The failure of Congress to understand the divestiture of the Plaintiff Class is, of course, further corroborated by the Senate and House's clear expression of intent to include the Plaintiff Class as evidenced by their written reports on the principal purposes of the Act itself.

tinue to receive dual benefits; however, the windfall part of the dual benefit would be frozen, not subject to future increases.

"The rest of the benefits, of course, would receive normal increases. . .

"Mr. Dempsey: Now then, *the second group of employees that would be protected are those who are not even on the railroad retirement rolls, but who have by January 1971* [*sic*:*1975*] *qualified under both railroad retirement and social security*; that is to say, they have both 10 years of railroad service and however many quarters of social security employment are necessary, given their age, to entitle them upon retirement to a benefit. They, too, upon retirement would receive a dual benefit, but again the windfall [would be frozen]. No one else in the future would qualify for dual benefits. . . ." — *Hearings on H.R. 15301 Before the House Committee on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 190 (1974) (emphasis added).

At no time in any of the discussions quoted above did the JLMC witnesses specifically refer Congress to that portion of their filed statements which might have revealed the harm to the Plaintiff Class, nor did they even allude to a potential divestiture even though the questions, as noted, revealed an obvious Congressional concern for the protection of all vesteds and an obvious Congressional belief that all such vesteds were being covered.

Congress, accordingly, sought to protect the benefits of all vested beneficiaries, present and future, and was led to believe that it had. Since the Act was drafted by the railroad industry, however, it expresses the desires of

that industry's union and management leaders, the JLMC. The industry's purpose was to divest the Plaintiff Class so that full dual benefits could be preserved for the protected class and certain other benefits could be increased.

The following JLMC colloquy on March 20, 1974, concerning the trade-off by the unions of the Plaintiff Class for full protection of, and increased benefits for, other beneficiaries, is revealing of this intention:

> Mr. Dennis [President Brotherhood of Railway and Airline Clerks]: . . . I think we are close on duals, although there is still a way to go. I personally care less about those who are not vested *and those who left the railroads,* except that some are laid off after fifteen or twenty years of railroad service. . . . So I think I can say, for the sake of unity and moving the problem, the organizations know how they have benefited the Plan; all they ask is a return to keeping the Plan we have, patching it up, making 60/30 meaningful but bringing the spouse and supplemental annuity down (?), and improving the widow benefits. . . .
>
> "Dr. Meyers [Labor's actuary]: . . . I developed this position, you saw its merits, labor has been considering it, and as I understand, labor is saying that they will give up on these people [the Plaintiff Class] if you will give up on those actives and preserve their relative position.
>
> "Mr. Dempsey: Does that mean that part of your modification with respect to inactives is agreeable if your approach as to actives is agreeable to us?
>
> "Mr. Dennis: The agreement will be that we are together on duals if we go on our formula." *Burner Deposition,* Exhibit I (Conference March 20, 1974, Washington, D.C.) (emphasis added).

The JLMC's March 19, 1974, meeting also showed the agreement of the negotiators on the sell-out of the Plaintiff Class:

> "Mr. Dennis: You have a proposal, and so does Dr. Myers. He has a number of papers on it, but I think you understand it: keep the current law in effect with certain changes [increased benefits] which come to about 3%, but savings to the plan come to a lot more on the deficit picture.—The dual benefits and other things would save a lot more than the new benefits would cost." *Burner/Deposition,* Exhibit 1 (March 19, 1974, Washington, D.C.).

Furthermore, Mr. Dempsey stated in the March 18, 1974 JLMC meeting that the Plaintiff Class was the group of vested beneficiaries that the JLMC needed to "hit":

> "Mr. Dempsey: . . . We are trying to hit this group of 160,000 [the Plaintiff Class] or its equivalent." *Burner Deposition,* Exhibit I (March 18, 1974, Washington, D C.)[10]

The Washington Post article on the Plaintiff Class, Howard, *130,000 Lose $2 Billion In RR Benefits,* Washington Post,[11] July 25, 1976, at page 1, col. 3, quoted Mr. Dennis' [JLMC labor member] justification for the elimination of the Plaintiff Class as follows:

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[10] At the time of the JLMC negotiations, the Plaintiff Class was then believed to include 160,000 persons. *Burner Deposition,* Exhibit I (Washington, D.C. meeting of February 13, 1974).

[11] This article was admitted as evidence, without objection, at the hearing on the cross motions for summary judgment. Dempsey, on behalf of the JLMC, responded in writing to this article and, in doing so, never denied the remarks of Dennis. Letter of Dempsey dated July 30, 1976. *Burner Deposition,* Exhibit S.

> "We were vitally concerned about our members, ... but in order to make the fund solvent, we had to sacrifice somebody. Some group had to go. And we didn't want to knock-off widows.
>
> "We had to make some sacrifices, Dennis said, 'we had to show Congress that we were making a good faith effort to revamp the fund . . .'
>
> * * *
>
> "Dennis said, however, that 'that group we cut were out working for someone else. They weren't railroaders anymore. We didn't really feel we were that responsible to them anymore.'" *Burner Deposition,* Exhibit S.

James Menger, counsel for the Committee on Interstate and Foreign Commerce during hearings on the Railroad Retirement Act of 1974, was quoted in that same article as follows:

> "No one was looking out for the people who were eligible for benefits but had left the unions. . . . They were scattered around the country, they were weak, they were unorganized, and as it turned out, they fared the worst. . .
>
> "It wasn't that Labor didn't care about the inactives, but just that they cared more about the actives. Those [the actives] are the people that can come back to you and say, '*You aren't going to be our union president anymore.*'" *Burner Deposition,* Exhibit S (emphasis added).

The article further discusses the post-legislative reaction of the Senate sponsor of the bill, Sen. William D. Hathaway (D-Maine), as follows:

> "Hathaway said he would look into the possibility of amending the act to provide equal benefits to active and inactive pensioners, scaled according to their years with a railroad. The 1974 justification for dif-

ferent treatment of active and inactive employees was 'admittedly tenuous' he said." *Burner Deposition,* Exhibit S.

The JLMC's cost analysis of its proposal perhaps most graphically shows the trade-off between the Plaintiff Class' vested dual benefit and the increased benefits to others.

> "The recapitulation, based upon data supplied by the Railroad Retirement Board, is as follows: Coupling the existing deficiency of about 9% of taxable payroll, on a level basis, with the additional costs of rectifying the existing inequities respecting widows, spouses, and supplemental benefits [increased benefits], the deficiency would be about 12%. However, the restrictions on dual benefits (about 2.5%) [the loss to the Plaintififf Class], the new formula (about 5%) and the adjustment of the financial interchange respecting phaseout dual benefit costs (about 4%), together with a few other economies relating to other of our recommendations, should put the fund into a situation of long-term balance for the present . . ." *Duensing Deposition,* Exhibit Q (letter to Senator Williams from JLMC dated April 10, 1974).

The higher benefits proposed for some recipients were made available by eliminating the vested status of the Plaintiff Class. The actuarial deficiency estimated at 9% could and should have been resolved without affecting the dual benefits for any of those who were vested.

In short, the Commission had sought an appropriate approach that would have resolved properly this 9 percent deficit problem and Congress believed that it was following that approach: the phase-out of the dual benefit structure with a concurrent recognition of vested rights. The JLMC pretended to take a similar line. In fact, though,

the JLMC drafted the Act to protect the vested rights of active railroaders, while repudiating the vested rights of the Plaintiff Class as the price for increasing other benefits. This was accomplished in a manner which, at best, left Congress and the public uninformed of the true nature of the JLMC's actions; at worst, it appears that the JLMC consciously misled concerned members of Congress who were struggling to comprehend an increasingly complex system.[12]

D. The disenfranchisement of the Plaintiff Class effected by the statutory scheme does not rationally further a legitimate governmental purpose.

There is no dispute that the overriding reason for the restructuring of the Railroad Retirement system was to protect or re-establish its actuarial soundness while preserving "vested" benefits. But the goal of the JLMC was to increase other benefits at the expense of a distinct class of vested beneficiaries. The method thus effected

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[12] It is not here suggested that the failure of Congress to recognize the effect of section (h) (1) on the Plaintiff Class is itself determinative of the irrationality of the provision. As Justice Stevens has noted, it would be unfortunate if "the constitutionality of legislation should turn on the actual motivation, or the lack thereof, of the legislators who participated in the legislative process." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 97 (1977) (dissent). But that factor adds to the likelihood that the provision is irrational, for it suggests that "there is no reason to believe that the discrimination is the product of an actual legislative choice." *Id.*, at 98 (dissent) [citations omitted]. The provision challenged here, unlike that in *Weeks*, was unnecessary and served no purpose; unlike the plaintiffs in this case, the plaintiffs in *Weeks* were not similar to the individuals protected by the challenged legislation. Moreover, the *Weeks* plaintiffs, unlike those herein, "had no vested rights. . . ." *Id.*, at 85.

by the statute accomplished the latter effort, not the former. The statute, therefore, effectively established an impermissible goal, and reached that goal by unacceptable means.

It is initially apparent that the provision of increased benefits to others was itself a direct repudiation of the need to reduce the apparent actuarial deficiency of the fund. As the Plaintiff Class has noted, restructuring the system provided a savings of about nine percent which represented the actuarial deficiency of the fund. There was no need to repudiate the established rights of *any* vested beneficiaries, present or future. Only as a result of the JLMC's decision to increase benefits for others was an additional deficiency created. In short, the statute took away benefits from some vested former railroaders in order to provide larger annuities for other beneficiaries.

This goal was not a permissible one in light of the already-existing actuarial problems of the fund. It was not a goal which Congress had originally suggested to the Commission, nor was it a goal that the Commission recommended to Congress, nor was it a goal that Congress presented to the JLMC.[13] If there was a compelling need

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[13] Both the Government, at 46, and the NRLC, at 30, state that the Commission recommended an increase in survivors benefits. This is incorrect. They point to the COMMISSION REPORT, at 337. This is a misleading citation, and it is not surprising that the Commission's exact words have not been quoted. After a brief discussion, the Commission merely stated that "there are good grounds for according a higher priority to improvements in survivor benefits than in benefits for the retired worker and his spouse." COMMISSION REPORT, at 337. An increase was therefore offered as one possibility but was only viewed as relevant in its relationship to the possibility of according higher benefits to a retired worker and his spouse. Moreover, the Commission makes clear that in

to liberalize and increase the benefit structure for existing beneficiaries—a factor which has not been established—it should have been accomplished by tapping general revenue funds, as Sen. Domenici sought to do in S. 467, *see* 123 Cong. Rec. S1448 (Jan. 26, 1977), or, preferably, by imposing a heavier tax burden. But providing higher benefits by negating the vested rights of some beneficiaries during an actuarial crisis represents the height of irrationality and unfairness. The JLMC initiated goal, as effected by the challenged statute, was itself impermissible.

Of equal importance is the fact that even in the absence of this impermissible effort to raise some of the benefits, the statute does not rationally accomplish the overriding purpose of resolving the fiscal problems. Even if the JLMC legitimately was concerned about protecting the actuarial soundness of the fund, the savings of costs alone "cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa* County, 415 U.S. 250, 263 (1974); *Medora* v. *Colautti*, 602 F.2d 1149, 1153 n.9 (3d Cir. 1979); *Silbowitz* v. *Secretary of HEW*, 397 F. Supp.

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[13] (Continued)
keeping with its main goal of preserving all vested pension rights, "any future benefits increases he accompanied by timely tax increases adequate to finance them" so that "the ratio of reserves to the rate of expenditures not be further impaired." COMMISSION REPORT, at 31. And at 21, the Commission stated that "Reforms to make future rights secure can and must be achieved without abridging any legally-vested present rights, even the right to dual benefits vested up to the date of changeover." Thus, the commission emphasized that *any* benefits increases must come from a comparable increase in the taxes and not from a decrease or trading off of *any* vested rights.

862, 867 (S.D. Fla. 1975), *aff'd* 430 U.S. 924 (1977). And this classificatory scheme, on its face, is invidious.

By the design of the JLMC, the statute facially discriminates against a distinct portion of vested beneficiaries, while other vested beneficiaries, identically situated, maintain their eligibility. This is the essence of an equal protection violation: "A general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Califano* v. *Jobst,* 434 U.S. at 53. "The Equal Protection Clause requires more of a state law than non-discriminating application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager,* 384 U.S. 305, 308 (1966). Equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966) (citation omitted). It is precisely that inability which dooms this classificatory scheme.

Here, to the extent that earned dual benefits might be injurious to the fund, the benefits received by both the protected and divested classes are equally injurious. Likewise, to the extent that equity compels the preservation of the dual benefits for those persons who were vested before January 1, 1975, equity compels that both classes receive those benefits. The two groups cannot be made distinguishable by changing the definition of "vesting" in the manner here done. *Richardson* v. *Belcher,* 404 U.S. 78, 83 (1971). The two groups are, in all material respects, the same. The distinction made between them is artificial. The 1974 Act, to the extent of its arbitrary classification, is therefore unconstitutional.

The Government has finally conceded that the pivotal point of this case is not *length* of service in the railroad industry, but, rather, the *timing* of that service. Government Brief, Question Presented at 2.[14] The Government suggests, however, that the timing of service is nevertheless a relevant factor by which to distinguish between positions of supposedly varying equitable values. Thus, the distinction between vested beneficiaries is now hailed by the Government as a "middle course" representing a legislative desire to protect those whom Congress "believed had the strongest equitable claim to receive [dual] benefits." Government Brief, at 27.

As this brief demonstrates, however, the distinction between vested beneficiaries based on the timing of their service was entirely irrational and represented a wholly inequitable choice. The artificial distinction between these vested beneficiaries was accomplished in section 3(h)(1) through use of the "current connection" and "work-in-1974" conditions. These rules have the effect, which was intentional, of protecting only the vested benefits of "active" railroaders.

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[14] Originally, in its Jurisdictional Statement, at 2, and also earlier before the District Court, the Government argued that "length of service" was a factor in differentiating between the protected and the divested classes. However, the Plaintiff Class in their Motion to Affirm and in this brief has unequivocally shown that the Plaintiff Class was selected for discriminatory treatment not because of its members' length of service but rather because they were not affiliated with the industry as of December 31, 1974 or when they retired. Unquestionably, both classes have performed the same length of service for vesting (10-25 years). The distinguishable characteristic was the time of such service and not length.

As employed in this instance, the current connection rule requires the railroaders to have worked in the rail industry for at least twelve of the thirty months prior to December 31, 1974, or prior to retirement. Even though the current connection rule in other contexts is not without a history in the railroad retirement scheme, its use in this situation is entirely different.

In the past, the current connection rule was used to "reward" certain railroaders in relation to a new supplemental or other non-basic retirement benefit, or to provide a new benefit to those who became disabled while working for the railroads. Government Brief, at 36-37, NRLC Brief at 10. As the District Court found, however, a current connection had never been used to decide which former railroaders would be denied a previously granted benefit. Nor had it ever been used to ascertain eligibility for the basic railroad retirement benefit. It was intended neither to distinquish between vested beneficiaries nor to determine who would have their vested rights recognized. It is thus inaccurate to state that the history of the current connection rule supports its employment in this context. Indeed, the facts demonstrate that the current connection rule and work-in-1974 rules are entirely inappropriate for defining "career" railroadern which is a suggested post-hoc rationalization for their use.

Of course, a protected beneficiary need not ever have actually had a current connection; rather he need only have worked one day in 1974. This work-in-1974 rule provides an alternative way of protecting already vested benefits.

The Government and the NRLC have emphasized the inequity of the work-in-1974 qualification and its unfair purpose by arguing that it is either irrelevant or redundant and therefore its patent unfairness may be ignored. Indeed, the Government seems unsure as to its significance. While initially claiming that the rule is appropriate and "consistent with the very essence of a grandfather clause," Brief of Government, at 29 n.15, it also suggests that the work-in-1974 rule is irrelevant. *Id.*, at 39 n.23. The NLRC is not so schizophrenic on this point. It contends that the rule essentially is redundant i.e., it sets forth an unnecessary repetition. NLRC Brief, at 23; *Id.*, at 23 n.29. Its theory, and apparently that of the Government's in its "alternative" approach to the issue, is that persons supposedly benefiting by it are also protected by section 3(h)(2)(B)(ii), which guarantees the dual benefits acquired prior to an employee's final railroad service.

In any event, the alleged redundancy does not distract from the specific language which, under any reading, demonstrates that the work-in-1974 provision in section (h)(1) is not, and was not intended to be, redundant to that in (h)(2). The first clause of section (h)(2) explicitly states that that section is *only* applicable to those who have not met any of these conditions of (h)(1). 45 U.S.C. §231b(h)2)(A). Quite obviously then, those who worked in 1974 are explicitly and solely covered by (h)(1), which guarantees them a full dual benefit. They are not covered by (h)(2).[15]

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[15] In its pretense that the work-in-1974 rule is irrelevant, the NRLC makes one especially jarring statement: "if [a railroader] continued in railroad service through 1974, [he] would have a current connection as of January 1, 1975." NRLC Brief, at 23 n.29. This statement could

Even if one were to assume, for sake of argument, that there was redundancy in using the specific work-in-1974 language in (h)(1), it does not alter one key fact: railroaders who by happenstance returned to the industry for even one day in 1974 have had their vested rights fully protected. Whether that protection is effected specifically by (h)(1) or in general by (h)(2) is completely irrelevant; in either instance, an arbitrary eligibility mechanism is used to validate the benefits of certain railroaders who have no more (and no less) right to these benefits than do those who "failed" to work any one day in 1974.

The work-in-1974 rule is thus a continuing part of the current affiliation requirement that bifurcates the Plaintiff Class from the protected class; at the time the Act was passed, it represented a specific intention to protect those former railroaders recently returned to that industry or about to return. The JLMC wanted to ensure that union members, no matter how recent their re-conversion to the industry and how tenuous their status as "career railroaders," would be fully protected. Thus, they purposely specified by amendment during the negotiation process that just one day's work in 1974 would right the "wrong" of having previously left the railroad industry. This Court was disturbed by the ease with which a former railroader could obtain an annuity under the 1934 Act by "temporarily" returning to the rail-

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[15] (Continued)
only be correct if the expression "through 1974" means the entire year of 1974; its context, however, implies a reference to only some work in 1974. By the very definition of the phrase, therefore, there could be no current connection on January 1, 1975. The man who worked 6 months or 6 days in 1974 could not have a current connection on January 1, 1975, and it was precisely for this type of individual that the work-in-1974 rule was created.

roads, *Railroad Retirement Board* v. *Alton Railroad Company*, 295 U.S. 330, 349 (1935); it should be no less disturbed by this cynical additional condition, which had the same result and was intended apparently to protect labor leaders' friends who otherwise might not vest under the new current connection requirement.

Interestingly enough, a career railroader, as viewed by Congress in the Act itself, is one who spends his "entire working life in the railroad industry," COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, RAILROAD RETIREMENT ACT RESTRUCTURING, H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974), not one who had fortuitious service on a particular day. Here, however, those protected, who are similarly situated to the Plaintiff Class, are distinguishable only by when they served the railroads, not by longer or career service. The Plaintiff Class is in all respects as close or as far from being a career railroader as are those otherwise protected. The new current affiliation rule does not even add one day to the length of service required of a railroader for vesting. Indeed, no restriction is placed on any railroader vested by the Act to keep him from leaving the roads at anytime after the minimum 10 years of service. If he worked one day in 1974 or was currently connected in 1974 he could leave with impunity thereafter and totally disregard all so-called "career" notions, yet he would remain vested. The discrimination cannot therefore be explained in reference to a career affiliation with the industry.

Moreover, by the employment of the new current affiliation rule, railroaders serving one day in 1974 or who were currently connected as of December 31, 1974, can vest and receive full dual benefits even though they may have

spent only one-half the time of a Plaintiff Class member with the railroad industry. For example, undisputed affidavits in the record below show Plaintiff Class members with 24 years 4 months of service, 24 years of service, and 23 years 7 months etc. Affidavits of Class Members filed as Sworn Answers to Interrogatories on December 22, 1978. On the other hand, a railroader under the 1974 Act is entitled to receive his full dual benefits so long as he served 10 years in the railrod industry with one day's service in 1974 or with a current connection with the railroad industry as of December 31, 1974.

There is no logic in the Government claiming that a railroader becomes a "career" railroader by virtue of having 10 years railroad service with one day of that time served in 1974 and thereafter leaving the railroad, while on the other hand, maintaining that one is not a "career" railroader who served 24 years with the railroad industry but who failed to serve any particular day of that 24 years sometime during the year 1974. In this situation, a member of Plaintiff's Class made *more than twice the contributions* to the Railroad Retirement Fund than those 10 year railroaders who were lucky enough to be currently connected as of December 31, 1974 or to have worked one day in 1974 or to be currently connected at the time of retirement. There is neither logic nor equity in that result.

We are mindful that the Government further suggests, after the fact, that "Congress could also reasonably conclude in 1974 that individuals who had a 'current connection' with the industry when Congress considered and passed the legislation or when they later retired, were more likely than others to be career employees . . ." Government Brief at 23. This new assertion fails for several additional reasons. First, Congress made no such

finding, and did not even suggest such a conclusion. Second, no such speculative conclusion would follow from the current connection or work-in-1974 rules since they only require service during 1974 or on a retirement date and not for a career or for any length of time longer than the service required of the Plaintiff Class. Third, even assuming *arguendo* the Government's wrongful assertion as fact, encouraging former railroaders to return to the industry to meet the current connection rule is antithetical to a primary goal of the Act, that is, that of encouraging older workers to retire so that new slots would be opened for younger workers, a goal asserted in both the briefs of the Government at 38, and the NRLC at 37.

Distinguishing between vested beneficiaries on the basis of *when* they worked in the railroad industry, whether it be 1947, 1967, 1973, or 1974, is irrelevant in terms of the overall goals of the Act. The important point, recognized by the Commission and Congress, was that all vested rights should be recognized. No other distinctions could fairly be made. If indeed there was any need to reduce the total amount of dual benefits paid out, then it should have been accomplished equally among all potential recipients of dual benefits, rather than by creating artificial distinctions based on the timing of their work record. *Accord, Dandridge* v. *Williams,* 397 U.S. 471 (1970). *When* they worked for the railroads is a different consideration than *how long* they worked for the railroads. The Commission understood the importance of recognizing the contribution of those who had satisfied the length of service test (i.e., vesting), but no one, save the JLMC with its ulterior motives, had ever suggested that vested rights were now to be conditioned on the timing of that service.

E. The Government should not be allowed to avoid constitutional guarantees of equal protection on the NRLC's wrongful assertion that the Plaintiff Class "deserted" the industry or was "disloyal."

Nor does the JLMC's rationale become more persuasive on the theory that the "inactives" (i.e., those who did not meet the current connection or work-in-1974 tests) had "deserted" the railroad industry. The available evidence suggests that most of the Plaintiff Class left because the declining railroad industry forced them out. Senator Domenici noted this factor: ["F]rom existing records and accounts, the majority of these former exployees had no choice of staying with the railroads. . . . I believe [this] to be [an] important consideration today as we attempt to correct this injustice." 123 Cong. Rec. S1448, *supra*. See also Affidavits of William Kirby and Horace Lindsey, filed Feb. 27, 1979; and Sworn Answers to Interrogatories, filed Dec. 22, 1978.[16] It was not their disloyalty to the railroads which motivated the JLMC determination to sacrifice these individuals, but rather the JLMC members' lack of interest in. or formal responsibility to, former railroaders who were no longer union members. As Dennis expressed it: "I personally

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[16] The Board suggests that plaintiff provided no evidence in his Motion to Affirm that many workers left the railroads involuntarily. Government Brief, at 30-31. That is inaccurate. In that brief, plaintiff noted, as he does here, that there was evidence that many had been forced out. Motion to Affirm, at 19. Secondly, Plaintiff has noted in this brief, supra, at 5, that the railroad industry has been slowly declining, thereby requiring many individuals to leave who would have stayed on. Indeed, the District Court so found, App. A-26, Findings of Fact #72. Finally, the Board's churlish remarks about Horace Lindsey, Brief for Appellant, at 31 n.17, represent only a self-serving twisting of the meaning of an 'involuntary" cessation of railroad work.

care less about . . . those who left the railroads. . . ." *Burner Deposition,* Exhibit I (March 20, 1974, JLMC conference). It is readily apparent that one day's service in 1974, for example, does not and should not determine "loyalty."

The NRLC wrongly asserts that the facts of *Railroad Retirement Board* v. *Alton Railroad Company,* 295 U.S. 330 (1935), demonstrate the Plaintiff Class' disloyalty to the rail industry. NRLC Brief, at 37-38. Although in 1935 when *Alton* was decided many of those who would have otherwise inequitably benefited from the Railroad Retirement Act of 1934 had "voluntarily" left railroad employment, the same assumption cannot be made in this instance. The Plaintiff Class has placed in the record and described the well-documented historic decline of the railroad industry, and has presented examples of class members forced to leave the industry; the evidence shows that "loyalty" was not a factor in the separation of members of the Plaintiff Class from the railroad industry. In a declining industry which mandated the reduction of the work force from 1,280,000 people to 582,000 people, no one can seriously suggest that the workers who left had any real control as a group over their destiny. It is therefore inappropriate for the NRLC to rely simplistically on the 1935 facts of *Alton* to support their latter day contentions here. The situations are different, and neither the Government nor the NRLC has presented any evidence to show otherwise.

Instead of "disloyalty" as the operative reason for singling out the Plaintiff Class, the efforts of the JLMC suggest, instead, an intention to sacrifice some vested beneficiaries so that others could receive still higher benefits. In that connection, it is absurd to suggest, as does the NRLC, at 31, that the increase in some benefits

should be evaluated separately from the denial of vested benefits to the Plaintiff Class. The two events were interwoven; indeed, it is apparent that the former could not have been possible without the latter. Put another way: the Plaintiff Class, who were not in unions, would not have been sacrificed, and need not have been sacrified, had not the JLMC decided to provide higher benefits to other categories of recipients. The JLMC recognized that one act required the other. *Supra,* at 11, 36-37, 39. The two alterations in the 1974 Act represented opposing sides of the same coin.

F. The JLMC caused Congress unwittingly to single out the Plaintiff Class, which had no opportunity to speak up.

Moreover, the effort was occasioned without any opportunity for the members of the Plaintiff Class to dispute it, and without regard to their established rights. The situation is analogous to that in *U.S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973), where a specified class of otherwise eligible beneficiaries—hippies —was singled out for disparate treatment. That treatment was also effected for an impermissible purpose and was therefore found unconstitutional.

> "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.,* at 534. (Emphasis in original).[17]

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[17] In a private pension case similar to this case, *Winpisinger* v. *Aurora Corporation of Illinois,* 456 F. Supp. 559 (N.D. Ohio 1978), the plan Trustees sought validation of a plan amendment which effectively cancelled the past service credits of certain beneficiaries with

The same is true here. Again, a class of eligible beneficiaries was deprived of their vested rights because of their disunity, lack of knowledge of the situation, and inability to influence those with power. This lack of knowledge and representation was a significant reason for the classificatory scheme which was ultimately designed. As Sen. Domenici said in sponsoring the effort to right this wrong:

> "The interests and concerns [of those adversely affected] were simply not taken into account in our

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[17] (Continued)
vested rights. The divested beneficiaries were not union members, while those in the union were not harmed by the amendment. *Id.*, at 563. The court agreed with the intervening Labor Department's contention that the "'distinction' from which the Trustees derive the 'rational basis' for their action which they contend renders it other than 'arbitrary and capricious' is based at the best on assumptions and surmises by the Trustees." *Id.*, at 571 (quoting from Labor Department's brief).

The Trustees argued, as does the Government here, that the actuarial soundness of the fund was threatened by the unfunded liability of the vested pension rights of the class against which they ultimately took action. But the court noted that the evidence showed otherwise. *Id.*, at 572. Furthermore, the court admonished the Trustees that if "drastic action" was necessary, the Trustees should not single out one class for mistreatment: "[I]f the Trustees choose to 'protect the fund' through a forfeiture of past service credits, the forfeiture must fall evenly on all participants in the fund." *Id.*, at 573. *Winpisinger* thus demonstrates the inequity of sacrificing one group — an unrepresented, powerless, non-union group — while leaving the other untouched. If any cuts were necessary, they should be applied equally. (*See also*, *Knauss* v. *Gorman*, 583 F.2d 82, 90-91 (3d Cir. 1978), in which the court found the trustees' evidence regarding the fund's actuarial soundness unconvincing and remanded for additional testimony).

haste to pass the 1974 amendments. . . . Their side of the question was never really considered or represented. . . . We, in Congress, cannot change laws adversely affecting thousands of Americans, and expect their continued faith and support in government. Surely changes in laws are necessary, but we should also be mindful of those overlooked in the process." 123 Cong. Rec. S1448 (daily ed., Jan. 26, 1977).

G. A similar previous deprivation of full dual benefits was found by Congress to be invidiously discriminating.

The inequity of the discrimination in this case is highlighted by Congress' action in repealing its only other effort to eliminate a dual benefit. As was previously noted, in 1951 Congress repudiated the dual benefits of former railroaders whose coverage was based on pre-1937 service, a period for which no contributions had been made to the fund (since it did not exist). Congress later retroactively repealed its prior enactment because of the inequities it produced. Congress' reasoning then is equally applicable to the instant situation:

"Until enactment of the 1951 amendments, the Railroad Retirement Act had been universally regarded as providing annuities and pensions to retired railroad workers for the rest of their lives, except for the months in which they performed compensated service for a railroad or for the person by whom they were last employed prior to retirement. This belief has been shattered by the enactment of the dual benefit provision of this law. This provision should be repealed promptly for the following reasons: . . .

"2. *It creates an inequity to employees compelled to seek social security employment.*

"It should be emphasized that many individuals who have qualified for benefits under both acts have done

so because they have been compelled to seek social security employment and not because they were seeking to qualify for an additional benefit upon retirement. . . .

"6. *It discriminates against a special group of retired employees*

"The dual benefit provision discriminates against a special group of retired railroad employees for the benefit of other beneficiaries under the act. Owing to this provision of the law, the railroad annuity or pension of a retired employee who has some credited prior service (i.e., service before 1937) is reduced if he is also entitled to an old-age benefit under the Social Security Act. No reduction is made in the annuity or pension or a retired railroad employee who does not qualify for an old-age benefit. The funds saved by not paying the higher benefit in the first case mentioned above is used to pay higher benefits to other beneficiaries under the act.

"The distinction made between a railroad annuitant or pensioner who also qualifies for a social security benefit and one who does not qualify for such a benefit is a distinction which is contrary to the spirit of the Railroad Retirement Act." H. Rep. No. 758, 83d Cong., 1st Sess. 6-10 (1953).

The House Committee in 1953 summarized its findings in this manner:

"The dual-benefit provision [of the 1951 amendments] discriminates against a special group of retired railroad employees for the benefit of other beneficiaries under the act. . . . The funds saved by not paying the higher benefit in the first case . . . is [sic] used to pay higher benefits to other beneficiaries under this act. . . . In the opinion of the committee, such discriminations against a special group of retired railroaders are wholly unjustified." H. Rep. No. 758, 83d Cong., 1st Sess. (1953).

Those same arguments exist in this instance. Again, a statute has deprived some vested beneficiaries of rights which had previously been established and upon which they had relied; again, that deprivation has taken place so that other recipients could receive higher benefits; and again, those who have suffered have been singled out as "disloyal" to the railroad industry, when the evidence suggests that most were forced into other occupations.

Indeed, though, the instant situation is much more invidious than that of 1951. At least then the deprived class was losing benefits for years of service during which they made no contributions to the Railroad Retirement fund. *See Scott* v. *Railroad Retirement Board,* 227 F.2d 684, 686 (7th Cir. 1955). Here, however, the Plaintiff Class is being denied railroad benefits for years in which they did make contributions. *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 15301* 93d Cong., 2d Sess., 222-223 (1974); *RAILROAD RETIREMENT BOARD, ANNUAL REPORT* 1973, at 35. The same reasons for righting the wrong of the 1951 effort are thus even stronger and more compelling in this situation.

H. The divestiture of the Class did not come about through mere imperfect line-drawing between classes.

The Government and the NRLC suggest that the present situation represents no more than the usual necessarily imperfect legislative effort at line-drawing, as in *Dandridge, Salfi,* and *Aznavorian.* But this is not a mere line-drawing exercise which might have been accomplished with more finesse, yet still manage to effect a reasonable goal. Rather, these lines were drawn intentionally and explicitly by the JLMC for the purpose of excluding the Plaintiff Class from receipt of dual benefits. In that

sense, it is not just an arbitrary, but inadvertent line-drawing; it is intentional.[18]

Despite their reliance on cases involving "arbitrary" lines, the Board and the NRLC must establish that the line was drawn to exclude the Plaintiff Class on the theory that their "equitable" entitlement to dual benefits was considerably less than that of the protected class. *See, e.g.,* Brief for Government, at 27-29, 34, 38, 51; NRLC Brief, at 33. The Plaintiff Class has demonstrated, however, that this division between vested beneficiaries bears no reasonable relationship to the overall goals of the 1974 Act, especially in light of the simultaneous increases to other beneficiaries. The NRLC attempts to defend this policy in part by claiming that, given the noncontractual nature of railroad annuities, there is no significance to "vesting." NRLC Brief, at 33. But that argument begs the question. It is beyond dispute that the Commission placed substantial reliance upon the meaning of vested, viewing it as providing the "middle ground" which rationally effected the goal of phasing out dual benefits. Moreover, the JLMC itself, in many of its expressions to Congress and between its members, also recognized the significance of vested status as of the effective date of the Act. And, indeed, to a great extent, vesting was recognized as the determinative factor in the guarantee of dual benefits. The sole exception to that general rule carved out the Plaintiff Class to fall on the

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[18] As Justice Stevens recently wrote in dissent: ". . . this therefore, is not a case in which the need to draw *some* line may justify the otherwise arbitrary character of the particular line which has been drawn. . . . [N]o principled justification for the particular discrimination against the [plaintiffs] has been identified." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 97-98 (1977) (emphasis in original).

"wrong" side of the equities. But the only explanation offered for that discrimination was that "inactives" were somehow mystically less entitled to a recognition of vested benefits than were the "actives." That is not a sufficient explanation, however, for an action which *deprives* individuals of previously guaranteed and vested benefits, regardless of its alleged rationality in defining those who should be entitled to additional, new or supplementary payments.

I. This discrimination does not represent a gradual approach to remedying the problem.

This distinction among vested beneficiaries cannot be rationalized as a gradual approach towards remedying the problem of benefits. See NRLC Brief, at 36. There is, of course, nothing gradual about the devastating impact of the Act upon the Plaintiff Class. Nor would any gradual approach allow for an increase in other benefits at the same time since this would be back-sliding on the attempted removal of the fund deficit.

While a gradual approach may be valid in some other circumstances *e.g., Geduldig* v. *Aiello,* 417 U.S. 484 (1974), it does not provide legislatures with the right to distinguish among retired workers whose relationship to the classification at issue is identical. Were it otherwise, a statute could classify workers or beneficiaries arbitrarily, without regard to their identical status, in order to reduce costs. But, this Court has repeatedly held that the savings of finite resources alone cannot rationalize invidious discrimination. *Supra* at 42-43.

J. There are no equitable considerations which favor the singling out of the Plaintiff Class for divestiture.

The Government's argument is ultimately dependent on establishing that equitable considerations have proper-

ly been served by distinguishing among vested beneficiaries on the basis of rules not previously applicable. In the Government's analysis, this discrimination is no different than distinguishing vested from non-vested beneficiaries. But the deliberations of the Commission, the early pronouncements of the JLMC, and the principal purposes of the Act as reported by Congress recognize that the line between vested and non-vested provides the *only* equitable mechanism with which to phase out dual benefits. The alternative, selected here by the JLMC and drafted into the Act, represents a repudiation of all policies and conditions which have preceded it, and cannot, in any guise, be countenanced as an equitable method. A distinction after the fact among vested beneficiaries, which negates rights already established, provides none of the incentives commonly associated with eligibility conditions and operates only to punish certain individuals for actions long since completed and over which they can exercise no control. It bears none of the insignia commonly associated with eligibility conditions. By contrast, the distinction between vested and non-vested is merely a further recognition of the qualitative change in status effected by having served a given period of time. It continues a recognition with which everyone is familiar and on which they have previously relied.

There was no existing actuarial reason not to have drawn the line between the vested and non-vested. Yet the JLMC, in a cloud of obfuscation and deceit, chose to recognize some vested rights, but not others. The choice was not merely one legitimate possibility among several. It was entirely irrational, and in violation of the logic and consideration previously directed at the issue. The selection of non-union and disorganized former railroad-

ers for discriminatory treatment was not a coincidence. It was deliberate, and it appears to betray the worst instincts of those who made that choice. In light of the purposes and goals of the Railroad Retirement Act of 1974, it was a wholly inequitable and irrational decision, and the classificatory scheme which resulted in the divestment of the excluded class should be invalidated as a violation of the constitutional guarantees of equal protection.

K. The reliance of the Plaintiff Class on the dual benefits emphasizes the 1974 Act's arbitrariness.

This Court has noted in the past that the extent of reliance by an individual on a deprived government benefit bears upon the constitutionality of that deprivation. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254, 265 (1970). *See also Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). The fact of reliance and the severe impact the 1974 changes had upon the loss of vested benefits to the Plaintiff Class which resulted from their reliance, is shown by the class members' affidavits filed and made a part of the record below which were supportive of the Plaintiff Class' Motion for Summary Judgment granted below. *See* Class Members Sworn Answers to Interrogatories filed December 22, 1978. The Government presented no evidence to the contrary of these affidavits.

These sworn answers show that many of the class members had been informed by the Government that they were to receive a specified dollar amount of pension from the railroad in addition to their Social Security benefits which amounted to their full vested dual benefits.

However, upon retirement, and after it was obviously too late to take corrective steps, they were informed that the dual benefits they had been promised were not to be paid in spite of their many years of past contributions. Even the Government admits that the Plaintiff Class as well as the protected class had "anticipated" the receipt of the lost benefits. Government Brief at 10. The JLMC said it best, when they spoke at the Congressional hearings about all those persons who were dually vested as of January 1975 (including the Plaintiff Class):

> "Mr. Dempsey: . . . the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. *They have relied upon the law.* They . . . should be protected." Hearings on H.R. 15301 Before the House on Interstate and Foreign Commerce, 93d Cong., 2d Sess., 213-14 (1974) (emphasis supplied).

See also the remarks of the labor member of the JLMC, *supra* at 9, made at the start of negotiations on the 1974 draft bill.

Mr. Dempsey's remarks during the negotiations further stress this point:

> "Mr. Dempsey: . . . The [dual] benefit is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. *But we cannot do that — we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.*" *Burner Deposition,* Exhibit I (March 18, 1974, JLMC meeting) (emphasis added).

As the undisputed evidence reflects, the Government's and the industry's breach of faith have injured the

Plaintiff Class members causing them to substantially alter their standard of living and their plans for retirement. While the Plaintiff Class' reliance and the importance of their Railroad Retirement benefits do not, of themselves, establish a denial of equal protection, they are factors which further support and lend emphasis to the unconstitutionality of the Act.

II. THE CLASSIFICATION IS ALSO UNCONSTITUTIONAL BECAUSE IT IS THE PRODUCT OF A CONGRESSIONALLY SANCTIONED BREACH OF A FIDUCIARY DUTY

The labor representatives of the JLMC owed the Plaintiff Class a duty of fair representation in the drafting of the Railroad Retirement Act of 1974 even though the Plaintiff Class members were no longer with the railroad industry and were not active in the railway unions. This duty arises from the unions' necessarily assumed role as the Plaintiff Class' representative in the negotiations and the Congressional mandate that the specific recommendations of the Railroad Retirement Commission be taken into account.

In the customary labor-management negotiation context, unions are not generally obligated to represent retired, non-union members in their negotiations with management. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Company,* 404 U.S. 157, 181 n.20 (1971). If the unions undertake to represent retirees, however, it may not sacrifice the retirees to advance the interests of the active union members.

> "This does not mean that when a union bargains for retirees — which nothing in this opinion precludes if the employer agrees — the retirees are without protection. Under established contract prin-

ciples, vested retirement rights may not be altered without the pensioner's consent." *Id.* at 181 n.20.

And, as the Third Circuit has stated:

> "When the Union elects to undertake such bargaining [for the retired employee], the Union's duty of fair representation must apply. . . . But having undertaken on behalf of the Fund, to enforce the employer's obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners." *Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir. 1977); *accord Hurd* v. *Hutnik*, 419 F. Supp. 630, 654 (D.N.J. 1976).

Furthermore, the duty owed by railroad unions to represent railroad employees whether or not those employees are union members has long been recognized by this Court.

> "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192, 199 (1944).

This Court in *Steele* likened the railway union's duty of fair representation to the duty owed by a legislature to those over whom it legislates.

> "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." *Id.*, at 198; *accord, Hargrove* v. *Brotherhood*

of Locomotive Engineers, 116 F. Supp. 3, 8 (D.D.C. 1953); *Crowell* v. *Palmer,* 134 Conn. 502, 58 A.2d 729, 732 (1948).

In their negotiations with management during early 1974, the union members of the JLMC were thus required to represent fairly those Railroad Retirement beneficiaries, such as the Plaintiff Class, who had no other voice, and not to sacrifice the Plaintiff Class for the benefit of the union's active members.

The unions were also required to represent fairly the Plaintiff Class because of the congressional mandate which created the JLMC. In Pub. L. No. 93-69, Congress gave the JLMC the following instructions:

> "Not later than April 1, 1974, representatives of employees and representatives of carriers, acting through the group designated by them pursuant to subsection (a) shall submit to such committees a report containing their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system *which recommendations shall take into account the specific recommendations of the Commission on Railroad Retirement.*" Pub. L. No. 93-69 §107(c)(2) (July 10, 1973) (emphasis added).

As noted above, the Railroad Retirement Commission recommended that the Plaintiff Class, along with the protected class, retain their earned dual benefits. Pursuant to these congressional instructions, the union and management representatives were thus to take into account the interests of the Plaintiff Class as protected by the Railroad Retirement Commission recommendations.

As previously indicated, the railroad unions "gave up" on the Plaintiff Class in exchange for protection of their

members and for an increase in benefits to other members. The union deserted the Plaintiff Class because union officials had no self-serving reason to consider the rights of the Plaintiff Class. The unions' trade-off of the Plaintiff Class in exchange for the protection and enhancement of the actives' benefits is graphically demonstrated by the JLMC's correspondence with Congress upon the JLMC's submission of its proposed draft bill.

> "The recapitulation, based upon data supplied by the Railroad Retirement Board, is as follows: Coupling the existing deficiency of about 9% of taxable payroll, on a level basis, with the additional costs of rectifying the existing inequities respecting widows, spouses, and supplemental benefits [increased benefits to the protected class], the deficiency would be about 12%. However, the restrictions on dual benefits (about 2.5%), the new formula (about 5%), and the adjustment of the financial interchange respecting phase-out dual benefits costs (about 4%), together with a few other economics relating to other of our recommendations, should put the fund into a situation of long-term balance for the present. . . ." *Duensing Deposition,* Exhibit A (Letter to Senator Willlams from JLMC dated April 10, 1974). Also see infra, at 11-12, 36-37.

The cost of the increase in benefits to the protected class (approximately 3% of taxable payroll) corresponds to the savings the fund realized by depriving the Plaintiff Class of their dual earned benefit (approximately 2.5% of taxable payroll). Without increasing the benefits of others, there was no need to deny the dual benefits to the Plaintiff Class. The union and management used the confiscated benefits to embellish benefits of the protected union members. This was a breach of the unions' duty of fair representation.

> "Where the sum is plainly due, the collective bargaining representative should have no power to waive or compromise the claim of one group of employees in return for a concession supposed to benefit a larger number. Such dickering in vested rights is simply taking money from one group to give to another. Even a legislature has no power thus to redistribute the wealth." Cox, *The Duty Of Fair Representation,* 2 VILL. L. REV. 151, 168 (1957).

Perhaps the breach is most graphically shown in the minutes of the March 20, 1974, JLMC meeting wherein labor, in serving up the Plaintiff Class for legislative execution, cavalierly states to management:

> "Mr. Dennis: I think we are close on duals, although there is still a way to go. *I personally care less* about those who are not vested and *those who left the railroads. . . .*" *Burner Deposition,* Exhibit I (emphasis added).

Of course, Mr. Dennis never informed any member of the Plaintiff Class of his attitude. The Class learned of this rejected attitude of labor only after passage of the Act and the impact of their divestiture became known.

Since the discrimination against the Plaintiff Class was the result of a congressional mandate to the JLMC to prepare a bill which was subsequently adopted by Congress, that bill, the Railroad Retirement Act of 1974, is unconstitutional to the extent of the discrimination, which results from the unions' breach of this duty to the Plaintiff Class.

> "But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." *Steele*

v. *Louisville & Nashville Railroad Company,* 323 U.S. 192, 208 (1944) (Murphy, J. concurring). See also *id.,* at 198-199.

III. THE GOVERNMENT HAS RAISED AN INAPPROPRIATE ISSUE AS TO RELIEF.

The Government has inappropriately raised a new issue of concern to the Plaintiff Class via a footnote at the end of its brief. Government Brief, at 51-53 n. 33. As this section will demonstrate, that issue should not be considered, and even if it is, defendant's suggestion should be rejected. Because the issue is potentially of great significance to the outcome of this case, the Plaintiff Class will not pretend to denigrate it by placing this discussion in a footnote. The Government's proposal should be rejected, but it cannot be ignored.

This is the first time in the course of this litigation, which lasted for nearly three years in the District Court alone, in which the suggestion has been made that a decision in plaintiff's favor on the merits should result in the nullification of benefits to the protected class rather than in the extension of benefits to the Plaintiff Class. Neither the Government nor the NRLC raised this possibility in their Jurisdictional Statement and supporting briefs. Additionally, the Government specifically has limited this case solely to the substantive issue of whether a denial of equal protection exists. Government Brief, at 2. Cf. *Califano* v. *Westcott,* 443 U.S. 76, 90-91 (1979). With the issue thus limited, it is improper for the government at this late stage, and in this manner, to attempt to deny the Plaintiff Class the relief it was accorded by the District Court.

It has long been recognized that questions not raised below cannot suddenly be brought up on appeal. *Trail-*

mobile Company v. *Whirls,* 331 U.S. 40, 50 (1947). This Court there noted that an issue not cited in the petition for certiorari could not be considered. Yet that is precisely what the Government now asks the Court to do. Since the issue was not properly presented to the Court, and since no "remedial incapacity" prevented the District Court from extending benefits to the excluded class, this Court should not even consider the issue. *Califano* v. *Westcott,* 443 U.S. at 91.

If the Court does consider this issue, it should reject the Government's contention. The Government argues that, if the Plaintiff Class is successful on the merits, the dual benefits of still more, but not all, vested beneficiaries should be stricken. Specifically, the Government suggests that those retired as of the effective date of the Act, and those still working but with at least 25 years of railroad service, should not lose their vested benefits, but those still working and with less than 25 years should lose their vested benefits as have the Plaintiff Class already. Contrary to the Government's implication, Government Brief, at 52 n.33, this proposal does *not* comport with plaintiff's analysis of the statute. Plaintiff has not suggested such a scheme in the past and does not do so now. Obviously, any exclusion of vested beneficiaries from a protected classification would be violative of the expressed principal purposes of the 1974 Act.[19]

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[19] If the Court were to decide to look at this question of nullifying benefits as an aspect of relief, the only possible or appropriate group for sacrifice would be those whose benefits were liberalized and increased by the Act, steps which, as plaintiff has noted, were directly responsible for the JLMC's decision to repudiate the vested rights of the Plaintiff Class. Such an action would be considerably more equitable than that suggested by the Government, for it would amount to a return to the pre-

In any event, though, *Westcott* counsel's strongly in favor of extension, not nullification. It would certainly not be appropriate to determine that the equities suggest that relief should not only be denied the Plaintiff Class, but also others who were entitled to protection of their vested rights. *Califano* v. *Westcott,* 443 U.S. at 89. Moreover, it is abundantly clear that Congress *did* intend to protect vested rights; thus, invalidation of more vested benefits "would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.* at 90.

Finally, any doubt as to the Congressional intent is answered by the fact that a severability clause virtually identical to that in the Social Security Act cited in *Westcott,* 443 U.S. at 90 and n.8, exists in the Railroad Retirement Act of 1974. 45 U.S.C. §231s. As in *Westcott,* the severability clause "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Id.* at 90. It would be ironic, indeed, if a specific governmental decision to phase out dual benefits, rather than to eliminate them entirely, were ignored in favor of invalidating still more vested rights. The Com-

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[19] (Continued)
1974 status quo and would comport with the mandate that the Commission and Congress gave the JLMC *viz.,* that all vested dual benefits would be recognized and the eligibility conditions and benefit levels existing at that time would be unchanged. The Government's suggestion, by contrast, would have the unfair result of validating the 1974 increases at the expense of even more vested dual beneficiaries.

mission and the JLMC wrestled with the problem of how to eliminate dual benefits equitably, and the middle approach was settled upon. This Court should therefore recognize that Congress accepted a general obligation to observe rights previously established. It would be a repudiation of that recognition for this court to eliminate additional vested rights as the "relief" accorded those who have only sought to assert their own vested rights.

The Government's last minute attempt to avoid the recognition of long-established vested rights is inappropriate and should be ignored. Alternatively, the court should recognize that, in this case, as in literally hundreds prior to it, extension of benefits to the excluded class was the appropriate relief and that the District Court properly took that action.

IV. CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,

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No. 79-870

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
APPELLANT

v.

GERHARD H. FRITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

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1. A central theme of appellee's argument is that the class he represents was singled out and uniquely deprived of the opportunity to receive a portion of the total railroad retirement benefits that its members expected to receive under the law in effect prior to the passage of the Railroad Retirement Act of 1974. This claim is erroneous.[1]

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[1] Even before 1974, Congress had provided that a person could not receive full benefits under both the Railroad Retirement Act and the Social Security Act. In 1966, 1968, and 1970, when Congress increased the amount of regular railroad retirement annuities to correspond to recent increases in the amount of social security benefits, it provided that the increase for persons who were also receiving social security benefits would be offset by the amount of the recent

Individuals who had not yet retired by January 1, 1975, may receive a full "windfall" benefit under 45 U.S.C. 231b(h)(1) only if, by that date, they had performed the ten years of railroad work necessary to receive railroad retirement benefits and a sufficient amount of non-railroad work to be fully insured under the Social Security Act, and then only if they (i) performed some railroad service in 1974, (ii) had a "current connection" (see 45 U.S.C. 231(*o*)) with the railroad industry on December 31, 1974, or when they later retired, or (iii) had completed 25 years of railroad service as of December 31, 1974. *Everyone else* is excluded from receiving the full "windfall" component of a railroad retirement annuity provided under 45 U.S.C. 231b(h)(1).[2]

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increase in those benefits. Pub. L. No. 89-699, Section 201(b), 80 Stat. 1075-1076; Pub. L. No. 90-257, Section 104(a), 82 Stat. 17-18; Pub. L. No. 91-377, Section 1, 84 Stat. 791. See generally D. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 390-392 (GPO 1978). (This is the "offset" referred to in footnote 1 to the chart set forth in our opening brief, at 7 n.5.) Indeed, as far back as 1953, the congressional Joint Committee on Railroad Retirement took note of the Railroad Retirement Board's position that while dual benefits did not then pose a serious problem for the railroad retirement system, either the Social Security Act or the Railroad Retirement Act could be amended in the future if the problem became more severe. S. Rep. No. 6, Pt. 1, 83d Cong., 1st Sess. 6 (1953), quoted in H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 8 (1974), and S. Rep. No. 93-1163, 93d Cong., 2d Sess. 8 (1974).

[2] Of course, persons such as appellee, who had left the railroad industry before 1974 without retaining a current connection to it at the close of that year, could receive a somewhat smaller "windfall" benefit under 45 U.S.C. 231b(h)(2) if they had 10 years of railroad service and were fully insured under the Social Security Act at the close of the year they left

To be sure, the section excludes the appellee class, which is comprised of people who had satisfied then-existing eligibility criteria under both Acts by January 1, 1975 but who had left the industry (without 25 years of service) prior to 1974 and retained no "current connection" with the industry at that time. But many others who also may have had an expectation of realizing the "windfall" of dual benefits upon retirement are excluded from eligibility as well.

For example, there were a substantial number of persons employed by the railroad industry when the 1974 Act was passed who had already worked the requisite number of non-railroad quarters to be fully insured under the Social Security Act but had not yet performed the ten years of railroad work necessary to be eligible for a railroad retirement benefit.[3] These employees are completely barred from receiving any "windfall" benefit, even if they fully intended to complete their working lives in the railroad industry and therefore expected to receive full dual benefits

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railroad work. Appellee fails to appreciate the significance of this alternative means of qualifying. Individuals who had already retired by the effective date of the 1974 Act and were receiving dual benefits are covered by a separate "grandfather" provision in Section 204(a)(3) of the Act, 45 U.S.C. 231 note.

[3] Statistics compiled by the Railroad Retirement Board in 1973 for use by the Joint Labor-Management Railroad Retirement Negotiating Committee ("Joint Committee") show that as of December 1972, there were 58,700 active railroad employees who were fully insured under the Social Security Act but had less than ten years of railroad work. All but 3,800 of these were under 55 years of age and therefore had sufficient time before retirement to accrue the ten years of railroad work necessary to be eligible for a railroad retirement annuity as well. Deposition of William L. Burner, Jr., Exh. B, at 16.

under both Acts when they retired.[4] By the same token, there were no doubt many employees who had left the railroad industry after ten years of service prior to 1974 but had not yet accrued the requisite number of quarters of non-railroad work to be fully insured under the Social Security Act by December 31, 1974. These individuals are likewise precluded from receiving any "windfall" benefit, even though they may have expected to become eligible to receive full dual benefits under both Acts when they retired.[5]

Thus, the appellee class is merely part of a broader category of individuals who may have had some expectation under the law in effect prior to 1974 of receiving the "windfall" of dual benefits when they retired. This Court has held, however, and appellee concedes (Br. 23), that social security and railroad retirement benefits are noncontractual and that Congress is free to amend the governing statutes and reduce or eliminate benefits—and thereby to alter the

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[4] Early in the work of the Joint Committee, labor representatives sought to protect the expectations of these active railroad employees by proposing that the bar to receipt of the "windfall" component apply only to employees hired after the effective date of the new Act. They soon abandoned that position, and it was not included in the Joint Committee's recommendation to Congress. See letter dated January 25, 1974, from William H. Dempsey, Chairman, National Railway Labor Conference, to C.A. Ball, *et al.*; Deposition of William L. Burner, Jr., Exh. F, at 2.

[5] Although the Joint Committee apparently considered extending "grandfather" protection to some persons in this category, the suggestion did not find its way into the Joint Committee's recommendation to Congress. See Deposition of William L. Burner, Jr., Exh. B, at 1.

expectations of present and prospective beneficiaries. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U.S. 603, 610-611 (1960). Congress has done so here with respect to all of the current and former employees just described.

2. a. Appellee contends, however (Br. 43-50), that it was irrational for Congress to deny "windfall" benefits to the class he represents because members of the class were fully "vested"—*i.e.*, had satisfied then-current eligibility requirements—under both Acts by the end of 1974, just like the individuals who are eligible for a "windfall" benefit under 45 U.S.C. 231b(h)(1). But in focusing on this similarity alone, appellee "ignores that a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson* v. *Robison*, 415 U.S. 361, 378 (1974). Here, the characteristic peculiar to those eligible to receive a "windfall" benefit under 45 U.S.C. 231b(h)(1) is that they, unlike appellee's class, had an affiliation with the railroad industry in 1974 or when they later retired.[6] Congress reasonably could conclude, as it did in enacting 45 U.S.C. 231b(h)(1), that employees who remain in the railroad industry would generally have more of a stake in the industry than those who had left and that they were therefore

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[6] A person would be eligible to receive a "windfall" benefit under 45 U.S.C. 231b(h)(1) if he was qualified under both Acts and had 25 years of railroad service by the end of 1974, even if he had previously left the industry. As noted in our opening brief (at 33-34), this constitutes a reasonable reward for persons who spent a major portion of their careers in railroad work. Appellee concedes that this distinction is rational (**Motion to Affirm 8 n.4**).

more deserving of the special annuity component at issue here.

b. Appellee argues (Br. 51-53) that the requirement in 45 U.S.C. 231b(h)(1) that the beneficiary have an affiliation with the railroad industry in 1974 is not a fair test of affinity for railroad work because most of the members of his class left the industry involuntarily. Contrary to appellee's implicit contention, however, Congress was not required to focus on the reasons why employees may have stayed with or left railroad work in the past; Congress could just as reasonably focus on the employment situation in the industry as it existed in 1974, without regard to prior events. The retirement system was, after all, designed "for persons who pursue careers in the railroad industry." *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 573. When Congress considered and passed the Act in 1974, it was the persons described in 45 U.S.C. 231b(h)(1) who were pursuing or were likely to have pursued careers in the railroad industry. Members of appellee's class, in contrast, had left railroad work altogether.[7]

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[7] Appellee suggests (Br. 47-48) that the work-in-1974 requirement in 45 U.S.C. 231b(h)(1) does not measure career status because it protects an individual who worked only "one day" in 1974. But the work-in-1974 criterion obviously was not designed for the specific purpose of protecting a person who had only one day of service in that year. The vast majority of employees who had any railroad work in 1974 would have worked throughout the year, as well as in preceding and succeeding years, and would therefore have had a relatively permanent attachment to the industry. This classification is not rendered irrational because it may also incidentally include a person who worked only one day in 1974. *Califano* v. *Jobst,* 434 U.S. 47, 53 (1977).

The alternative criterion in 45 U.S.C. 231b(h)(1)—that the person have a "current connection" with the industry in

c. Appellee has fallen far short of establishing that the statutory classification is irrational, even assuming that the classification was drawn principally on the legislative premise that the majority of the members of the appellee class had left railroad work voluntarily. Appellee relies in large part (Br. 51) on sworn answers he received from 41 members of the class in response to "interrogatories" to which he requested them to respond.[8] But appellee has not demonstrated that these 41 persons constitute a representative sample of the 86,000 former railroaders who would receive full "windfall" benefits under the district court's decision. Moreover, a review of these answers discloses that three of the 41 respondents

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1974—largely overlaps with the work-in-1974 criterion, because most people who performed some railroad work in 1974 would also have performed such work for 12 of the 30 months preceding December 31, 1974, and would thereby satisfy the "current connection" test as well. As explained in our opening brief (at 29 n.15), the "current connection" provision principally serves to protect workers who may have been on furlough or otherwise temporarily out of railroad work in 1974.

Appellee concedes (Br. 45) that there is a history of using the "current connection" concept in determining eligibility for other benefits under the Railroad Retirement Act (see our opening brief, at 35-37). He contends, however, that the present case is distinguishable because that test has never before been used to limit eligibility for an existing benefit. Contrary to appellee's suggestion, however, we believe that Congress' reliance on the well-established "current connection" concept underscores, rather than undercuts, the reasonableness of its approach in phasing out "windfall" benefits.

[8] See Exh. A (individual class members' sworn answers to interrogatories referred to in the Notice of Intention to Offer Class Member's Answers to Interrogatories in Evidence at Trial Pursuant to Rule 803(24) of the Federal Rules of Evidence, filed Dec. 12, 1978; R. 314-317).

were fired for cause,[9] 20 stated in response to a specific question that they had *not* left railroad work involuntarily,[10] and four others resigned rather than accept another position with their employer.[11] In short, almost two thirds of the respondents in appellee's own sample did not leave railroad employment under circumstances that could properly be regarded as "involuntary."

Appellee also points (Br. 5, 51) to evidence of a decline in overall railroad employment of more than 50% between 1937 and 1972. But this bare statistic fails to reveal how much of the reduction was accomplished by attrition rather than lay-offs or how this overall trend may have affected members of the class in this case who, with at least ten years of railroad service, had substantial seniority when they left railroad work.[12] Thus, the record wholly fails to establish

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[9] See answers to interrogatories 7 and 8 submitted by class members Brown, Clere, and Reiff; Exh. A, note 8, *supra*.

[10] See answers to interrogatory 7 submitted by class members Bujold, Edwards, Campbell, T. Boyd, Bayers, Bain, Hansen, Macha, Mattson, Krolicki, Branson, Gilliland, Marvin, Szilagye, Fridman, Day, Prescher, Andrews, Nippo, and Sherek; Exh. A, note 8, *supra*.

[11] See answers to interrogatories 7 and 8 submitted by class members Meyer, Richards, H. Boyd, and Howe; Exh. A, note 8, *supra*.

[12] Appellee also relies (Br. 51) on affidavits submitted by two other class members. As pointed out in our opening brief (at 31 n.17), however, even this small sample fails to support appellee's argument, because one of the two employees resigned rather than accept another position with his company. The only other "evidence" on the voluntariness issue cited by appellee is a statement by Senator Domenici, when he introduced a bill to restore "windfall" benefits to the appellee class

that Congress had "no reasonable basis for believing" (*Vance* v. *Bradley*, 440 U.S. 93, 111 (1979)) that a substantial number of individuals who were no longer in railroad work in 1974 had left voluntarily—again, even assuming that this issue is relevant in assessing the constitutionality of 45 U.S.C. 231b(h)(1).

3. Appellee maintains (Br. 9-10, 36-44) that the exclusion of members of the class from eligibility for "windfall" benefits was made necessary by the decision to increase benefits for spouses, widows, survivors and early retirees. In appellee's view, increasing benefits was an "impermissible" goal (Br. 42), in view of the railroad retirement system's actuarial problems. Accordingly, the argument proceeds, the reduction in "windfall" benefits necessary to permit an increase in other benefits was not permissible either. This line of reasoning fails for several reasons.

Most importantly, it scarcely can be "impermissible" for Congress to increase benefits under a social welfare and retirement program such as this, or to adjust the relative amounts of different benefits within the program. Nor are such measures rendered irrational merely because they are undertaken in legislation that is otherwise principally concerned with

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in 1977, that "from existing records and accounts, the majority of these former employees had no choice of staying with the railroads * * *." 123 Cong. Rec. 2230-2231 (1977). The Senator offered nothing in support of this assertion.

Appellee also errs in relying (Br. 51 n.16) on the district court's finding of fact #72 (J.S. App. 26a) to the effect that "many" members of the class were forced to leave the railroad industry involuntarily. The court failed to identify what it meant by "many," either in absolute terms or as a percentage of the overall class. In any event, this finding of fact appears to have been based on nothing more than the scant evidence described above and in the text.

trimming costs. Congress may accomplish different purposes in the same legislation.

Moreover, appellee still has failed to cite any evidence in the legislative record that Congress viewed the increased benefits as dependent on the supposed "sacrifice" of "windfall" benefits for those who left railroad work before 1974. Whether the Joint Committee perceived a quid pro quo relationship between the two is irrelevant (see Appellant's Br. 45-47), although the evidence in the record indicates that it did not.

For exampie, William H. Dempsey, the management representative of the Joint Committee, testified in the House Hearings that if the unions had agreed not to increase benefits, the Joint Committee nevertheless would have made "precisely the same argument with respect to the phaseout dual benefit cost." [13] Evidence of the Joint Committee's deliberations also reveals that the Committee reached agreement on the manner of phasing out dual benefits *before* agreement was reached on whether benefits should be increased, not after, as appellee suggests (Br. 10-11, 39, 41). See Deposition of William L. Burner, Jr., Exh. I, at 27-29, 61-62.[14] Finally, although it was estimated that the

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[13] See *Restructuring of the Railroad Retirement System: Hearings before the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 232 (1974). See also *Restructuring of the Railroad Retirement System, 1974: Hearings before the Subcomm. on Railroad Retirement of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 2d Sess. 318, 330 (1974).

[14] Indeed, it appears that the formula eventually enacted in 45 U.S.C. 231b(h)(2), which governs the eligibility for "windfall" benefits of those (like the class members herein) who left the industry before 1974, was proposed because many former railroaders would have received *more favorable* treat-

increased benefits proposed by the Joint Committee would increase the actuarial deficit by about 3% of taxable payroll,[15] the elimination of those persons in appellee's position from eligibility for "windfall" benefits under the provision eventually enacted as 45 U.S.C. 231b(h)(1) was expected to save less than one third of that amount (Deposition of William L. Burner, Jr., Exh. G at 10, Exh. I at 33, 36, 38). This wide disparity confirms that the elimination of dual benefits for members of the class could not have been designed to fund the increased benefits for other recipients.[16]

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ment than active employees under the proposals the Joint Committee then had under consideration. Deposition of William L. Burner, Jr., Exh. I, at ~~284-286, 287~~. 13, 25-26, 61-62

[15] See Letter from the Joint Committee to Senator Williams, Deposition of Hollis G. Duensing, Exh. Q, at 4, 8; 120 Cong. Rec. 18392-18393 (1974).

[16] Appellee errs in arguing (Br. 39, 66) that a paragraph in the Joint Committee's letter to Senator Williams (see note 15, *supra*) demonstrates a trade-off between increased benefits and withholding the "windfall" annuity from class members here. The paragraph quoted is only a recapitulation of the sources of the total deficit in the Railroad Retirement Account and the various means by which the Joint Committee proposed to eliminate that deficit. There is no suggestion in the paragraph that the increase in benefits was dependent on elimination of "windfall" benefits for any particular category of individuals. Moreover, contrary to appellee's suggestion (Br. 39), the 2.5% reduction in the actuarial deficit mentioned in the letter was attributable to *all* measures the Committee recommended to trim dual benefits (including a prohibition against accruing "windfall" benefits in the future), not solely to the manner in which the eligibility of the appellee class and others who had left the industry before 1974 was to be determined. Deposition of Hollis F. Duensing, Exh. Q, at 5-6; 120 Cong. Rec. 18392 (1974).

4. Appellee errs in suggesting (Br. 38, 47, 51-52) that the exclusion of the class members from eligibility under 45 U.S.C. 231b(h)(1) was the result of animus directed toward them because they were no longer members of the railroad unions. He cites no statement by a Member of Congress suggesting such a motivation. In any event, those who left the railroad industry before 1974 and were therefore not union members in 1974 were *not* wholly excluded from receiving windfall benefits; their eligibility is simply governed by a different section, 45 U.S.C. 231b(h)(2). Moreover, the group whose eligibility for benefits was most completely protected consisted of persons who were already retired when the 1974 Act was passed and were therefore not union members either. Conversely, many employees who were still in the railroad industry, and therefore union members, were deprived of the expectation of receiving full dual benefits in the future if they had not qualified for benefits under both statutes by the end of 1974. Accordingly, there simply is no basis in the record for concluding that 45 U.S.C. 231b(h)(1) has the purpose or effect of discriminating on the basis of affiliation with a union.

5. Appellee argues (Br. 68-71) that the Court should not consider the propriety of the relief ordered by the district court if the Court concludes that the statutory classifications established in 45 U.S.C. 231b(h)(1) are unconstitutional, because the issue of remedy was not presented to the court below or identified as a separate question in the Jurisdictional Statement. But the general rule barring consideration of issues not raised below or separately presented in the jurisdictional statement or certiorari petition is not an inflexible one, and the Court has considered such questions in appropriate circumstances. See

Cuyler v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 7 n.6; *Carlson* v. *Green*, No. 78-1261 (April 22, 1980), slip op. 2 n.2; *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980).[17] Several factors weigh in favor of the Court's consideration of the proper relief, should it conclude that 45 U.S.C. 231b(h)(1) unconstitutionally distinguishes among beneficiaries.

First, the issue concerns only the nature of the appropriate remedy and is, in this sense, closely related to the resolution of the constitutional issue presented to the Court. Cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 371-372 n.4 (1967).[18] Indeed, the nature of the appropriate remedy depends in part on the same assessment of legislative purposes underlying the provision for "windfall" benefits that must be undertaken to resolve the constitutional issue itself. See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76, 91-93 (1979); *id.* at 94-96 (Powell, J., dissenting); *Welsh* v. *United States*, 398 U.S. 333,

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[17] See also *Procunier* v. *Navarette*, 434 U.S. 555, 560 n.6 (1978); *Connor* v. *Finch*, 431 U.S. 407, 421 n.19 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238 (1976); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 371-372 n.4 (1967). Cf. Sup. Ct. R. 34.1(a).

[18] Moreover, this case is before the Court on direct appeal from the district court under 28 U.S.C. 1252, and it therefore has not benefited from the full fleshing out of issues afforded by intermediate review in the court of appeals. It is clear that this Court may consider the nature of the relief that should be granted, because an appeal under 28 U.S.C. 1252 brings the "whole case" before the Court, not merely the constitutional question. *Williams* v. *Zbaraz*, No. 79-4 (June 30, 1980), slip op. 8, quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

365-366 (1970) (Harlan, J., concurring). And the issue has been briefed by the parties. *Carlson* v. *Green*, *supra*, slip op. 2 n.2.

Also bearing on the need for review of the remedial issue is the current financial condition of the railroad retirement system. In recent testimony, the Chairman of the Railroad Retirement Board informed the House Committee on Interstate and Foreign Commerce that the Board's actuary has estimated that the system could run out of money to cover existing benefits as early as 1982.[19] Under these circumstances, the Court should not affirm a judgment that would widen the actuarial deficit of the Railroad Retirement Account even more, if the Court has substantial doubts about the correctness of that judgment.[20]

In the latter regard, we note that Congress placed limitations on the receipt of "windfall" benefits in 1974 because the railroad retirement system would be bankrupt by 1981 if the "windfall" was permitted to continue, "and there will be insufficient funds available to pay benefits at the present level to anyone—past, present, or future beneficiaries." S. Rep. No.

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[19] This testimony was delivered on September 4, 1980, at a hearing on H.R. 7793, 96th Cong., 2d Sess. (1980), a bill to amend the Railroad Retirement Act of 1974. The estimate was also contained in the Chairman's prepared statement submitted for the record of the hearing. The transcript of the hearing has not yet been published by the Committee.

[20] The Court observed in *Califano* v. *Westcott*, *supra*, that, although the cost of fully extending benefits to remedy the constitutional infirmity in the statutory provision involved did not preclude the extension of benefits under the circumstances of that case, "cost may prove a dispositive factor in other contexts." 443 U.S. at 93. Given the serious financial problems of the railroad retirement system, we believe that cost is a significant, if not dispositive, factor here.

93-1163, *supra*, at 7; H.R. Rep. No. 93-1345, *supra*, at 7. Much the same situation obtains today, notwithstanding the passage of the 1974 Act, and there is no reason to believe that Congress now would adopt a different approach in the face of a serious deficit and *expand* "windfall" benefits in the manner ordered by the district court. The alternative remedy of limiting "windfall" benefits in the manner suggested in our opening brief (at 51-53 n.33) conforms to legislative intent and present fiscal realities, and once again would allow Congress the opportunity to weigh the competing equities and financial needs of the railroad retirement system. Congress may, of course, extend benefits in the manner ordered by the district court if it so chooses.

In addition, should the Court conclude that 45 U.S.C. 231b(h)(1) is unconstitutional, the propriety of extending benefits would in any event be raised when the district court considers the appropriate relief to be granted to individuals who were not retired by January 31, 1977 and who therefore are not members of the class already certified. See J.S. App. 34a-35a. Principles of sound judicial administration therefore would be served by addressing the issue now (*Carlson* v. *Green*, *supra*, slip op. 2 n.2), or, at the very least, by remanding the question of remedy for the certified class to the district court for consideration together with the nature of relief to be granted to persons not now included in that class.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

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No. 79-870

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

v.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY, AMICUS CURIAE

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May 21, 1980

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Interest of the Amicus

Legal Services for the Elderly is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly has participated as co-counsel or amicus

in numerous cases before this Court involving the elderly, including Graham v. Richardson, 403 U.S. 365 (1971); Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971); Ortwein v. Schwab, 410 U.S. 656, reh. den., 411 U.S. 922 (1973); F. D. Matthews, Sec. HEW v. Diaz, 426 U.S. 67 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); and Foley v. Connelie, 435 U.S. 291 (1978).

All parties have consented to the filing of this amicus brief. Originals of the consents are annexed.

DECISION BELOW SHOULD BE AFFIRMED

The Railroad Retirement Act of 1974 distinguishes between two classes of railroad workers, allowing one class to receive all the benefits to which they had become entitled during their working lives, and depriving the other class of

the same benefits. The members of these classes do not differ in the length of time they had worked in the industry, but only in the timing of that employment. Both classes consist of workers who worked for the railroads for more than ten but less than twenty-five years. Those workers in the protected class, however, were currently affiliated with the railroad industry when the Act was passed, or had been affiliated with it during the preceeding year, while those in the plaintiff class were no longer employed in the industry.

The distinction was made in an effort to remedy the financial difficulties of the Railroad Retirement System. One of the mandates of the Commission on Railroad Retirement, created by Congress in 1970, had been to recommend methods of

accomplishing this objective. Having isolated the payment of dual benefits as a significant factor, the Commission determined that dual benefits should not be eliminated entirely, but should be phased out, so that those workers with vested benefits would continue to receive them. In fact, this was the only one of the Commission's recommendations which was not followed by the Joint Labor-Management Negotiating Committee who prepared the bill restructuring the Railroad Retirement System. That Committee, in order to fully eliminate the fund's deficit, removed the plaintiff class from those who would continue to receive dual benefits. The decision to do so was made specifically in order to eliminate the 3% deficit which had been created by an increase in benefits

granted to the union.

The Committee's justification for distinguishing between the two classes was that the plaintiff class had "a lesser equitable claim than those who have remained with the railroad industry." HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 15301, 93d Cong., 2d Sess., at 168 (1974). However, as plaintiffs explain in their Motion to Affirm, "they were selected, as a class, for disparate treatment, despite having the identical nexus of eligibility to the benefit programs as do the members of the protected class....apparently because of their political unpopularity and powerlessness among those undertaking the selection." Motion to Affirm at 18. The crucial factor seems to have been that members of the plaintiff class

were in a position of even greater helplessness than other persons who had retired from the industry. Not only were they retired, so that their needs were of less concern to the union than those of the current workers, but also they had left the industry to work elsewhere. (as the District Court's Findings of Fact indicate, many of them were forced to leave the industry because of the constant reduction in the numberof workers needed.)

The special vulnerability of the members of the plaintiff class is typical of that shared by all elderly people. Not organized as a group, they are without a voice to press for help with their special needs. Retired from their jobs, no longer receiving a salary, they must depend on their pensions and Social Security payments

for support. As their affidavits make clear, the members of the plaintiff class had made large contributions toward their pensions as well as to social security. Having fully expected to have a fixed income of a certain amount to live on after retirement, they suddenly found themselves with a greatly reduced income. They were thus cast into an even more difficult position than most of the elderly, all of whom must live on a fixed income in times of high inflation. All of this is clearly documented in the District Court's Findings of Fact:

> 66. Plaintiff's certified class are all fixed-income elderly people whose productive, income-earning years are now behind them. These fixed-income retirees cannot now relive their earnings years.

> 67. The entire class of persons injured by the classification...lost approximately $88 per month per person as a result...
>
> ...
>
> 69. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. FINDINGS OF FACT AND CONCLUSIONS OF LAW, p. 18.

These retired people's economic needs are greater than those of workers still in the labor force, and yet, because of their position of powerlessness, their interests are not as assiduously represented as are those of people who are still employed in the industry. The remarks of the head of the union, quoted in the Motion to Affirm at 36, typify the attitude to the plaintiff class: "We were vitally

concerned about our members,...but in order to make the fund solvent, we had to sacrifice somebody." The lack of concern for the retired workers is further exemplified by the failure of anyone involved to inform them of the impending reduction in benefits. As documented in the Findings of Fact of the District Court, class members were not notified of the possible reduction while Congress was working on the Act, nor were they invited to participate in the hearings. (Findings of Fact Nos. 46 and 51).

Appellants attempt to justify the exclusion of the plaintiff class on the basis that "Congress could...rationally conclude that individuals who remained employed by a railroad have in general demonstrated a greater commitment to or

affinity for the industry for which Congress designed the special statutory retirement program." Brief for the Appellant at 30. However as appellee's brief points out, "[t]he available evidence suggests that most of the appellee's class left because the declining railroad industry forced them out." Motion to Affirm at 19. The members of this class are, then, even more vulnerable than most elderly people. Because of an economic situation beyond their own control they had to leave the line of employment in which they had expected to spend their lives. Now that industry wants to deny them the benefits to which they became entitled while they were working. A more vicious ex post facto denial of benefits and expectations could not be imagined.

CONCLUSION

Decision below should be affirmed.

Respectfully submitted,

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Appellee.

On Appeal from the United States District Court for the Southern District of Indiana

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

The Court noted probable jurisdiction of this appeal in an order entered on February 19, 1980. Jurisdiction of the appeal is granted by 28 U.S.C. § 1252. This *amicus* brief is filed with the written consent of counsel for both the Appellant and the Appellee pursuant to Rule 42 of this Court.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference is an unincorporated association which includes almost all of the

nation's Class I railroads among its members. Among other things, the Conference represents those railroads in a wide variety of labor relations problems of concern to the railroad industry generally, including those relating to legislation or proposed legislation concerning the retirement benefits of railroad employees, their spouses and survivors. A committee established within the Conference, the National Carriers' Conference Committee, normally represents member railroads in national collective bargaining with the unions representing their employees. The members of the National Carriers' Conference Committee were the management members of a Joint Labor-Management Railroad Retirement Negotiating Committee established by the Congress which, at the direction of the Congress, drafted the bill enacted by the Congress with some changes as the Railroad Retirement Act of 1974. Hence, the Conference is thoroughly familiar with the background and purposes of that legislation, including the windfall dual benefit provisions held to be unconstitutional by the District Court.

For those and other reasons, that decision is a matter of major importance to the Conference and its member railroads. If not reversed, the decision below will upset the solution adopted by the Congress in 1974 to the problem of windfall dual benefits which threatened the solvency of the railroad retirement system. According to the Jurisdictional Statement (n. 8, p. 15), the Railroad Retirement Board has estimated that the additional benefits required to be paid by that decision would result in a cost to the system of $119 million a year for each of the next 20 years, or some $2.38 billion in all. Moreover, the decision below exhibits a misunderstanding of the 1974 Act, its background and legislative history, including the role of both management and labor members of the Joint Negotiating Committee. We believe that this brief will assist the Court by correcting those misunder-

standings and in otherwise supplementing the factual statements and legal arguments made by the Government. In particular, we shall demonstrate that the distinctions made by the Congress in phasing out windfall dual benefits, rather than being irrational as concluded by the District Court, were based upon factors—long-term railroad service and a current connection with the railroad industry—that the Congress historically has considered to justify more favorable treatment under the railroad retirement system which primarily is intended to provide benefits for career railroad employees.

STATEMENT OF THE CASE

A. The Establishment and Development of the Railroad Retirement System.

(1) The railroad retirement system is the only Federal retirement program applicable to a single private industry. As this Court recently observed, it "provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry" and was established to "encourage older workers to retire" so as to "'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573-574 (1979). When the initial effort to accomplish that purpose was aborted by a decision of this Court [1] holding the Railroad Retirement Act of 1934 (48 Stat. 1283) to be unconstitutional "on the ground that it took property in violation of the Fifth Amendment and exceeded Congress' power under the Interstate Commerce Clause," the "Congress then promptly enacted substantially similar legislation in 1935 based on its power to tax and spend to promote the general welfare. 49 Stat. 967, and 974." *Id.*, at 574 n. 3. And, when "the operation of that legislation was

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[1] *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935).

enjoined" by a lower court,[2] "Presidential intervention and extensive negotiations" between the railroads and the unions representing their employees produced a bill "that became the Railroad Retirement Act of 1937. 50 Stat. 307." *Ibid.*

The Railroad Retirement Act of 1937 (hereinafter the "1937 Act"), as amended from time to time, thus provided the statutory basis for railroad retirement benefits until the enactment of the Railroad Retirement Act of 1974 (hereinafter the "1974 Act"), effective January 1, 1975.[3] Those benefits generally have been financed by employment taxes imposed upon both the railroads and their employees, based upon employee compensation from railroad service up to a monthly maximum.[4] Both the

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[2] *Alton R. Co.* v. *Railroad Retirement Board*, 16 F. Supp. 955 (D. D.C. 1936). But see, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *State of California* v. *Anglim*, 129 F.2d 455 (9th Cir. 1942), cert. den., 317 U.S. 669 (1942).

[3] The 1937 Act, as amended prior to the 1974 Act, is set forth in the 1970 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 228a-228z-1, while the 1974 Act as amended is set forth in the 1976 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 231-231t. For convenience and in view of the difference in section numbers, references to specific provisions of the 1937 Act hereinafter are cited to the appropriate section of the 1970 edition of 45 U.S.C. while references to specific provisions of the 1974 Act are cited to the appropriate section of the 1976 edition of 45 U.S.C. Both are included in 45 U.S.C.A.

[4] Such taxes are now imposed by the Railroad Retirement Tax Act (Chapter 22 of the Internal Revenue Code), 26 U.S.C. §§ 3201-3233. At present, both the railroads and their employees pay a tax rate that automatically is the same as the social security tax rate (now 6.13%) for employers and employees. See 26 U.S.C. §§ 3101, 3111, 3201, 3221(b). Since a 1973 amendment (87 Stat. 162), the railroads alone have paid an additional tax in the amount of 9.5% of taxable compensation. 26 U.S.C. § 3221(a). Prior to that amendment, the tax in excess of social security taxes was divided equally between the railroads and their employees, except that since a 1966 amendment (80 Stat. 1078) the railroads alone have paid a

benefits and the taxes consistently have been substantially higher than comparable social security benefits and taxes. See Report of the Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H. Doc. 92-350 (1972) (hereinafter "CRR Report"), at 7-8, 14, 17-18.

(2) As the Commission on Railroad Retirement observed, "[a]t the outset the railroad retirement system was almost solely a career employee retirement program and this emphasis remains the primary thrust of the system to this day." CRR Report, at 6-7. Among other things, the "retirement benefit formula was structured primarily to reward length of career service in the railroad industry," while the "social security system has developed along lines which emphasize social adequacy rather than career service." CRR Report, at 7. To a certain extent, that emphasis upon rewarding career railroad service in the railroad retirement benefit formula was diluted by amendments of the 1937 Act which imported features of the social security system (CRR Report, at 6-7), and particularly by a 1951 amendment guaranteeing that railroad retirement benefits would at least be equal to those that would be paid by social security.[5] "This changed the railroad retirement system into a family income maintenance program by establishing the entire social security benefit structure as a floor

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supplemental tax to finance the cost of certain supplemental benefits. See p. 7, *infra*. The rate of that supplemental tax, which is applicable to man-hours of compensated work, is fixed for each calendar quarter by the Railroad Retirement Board at a level intended to "make available sufficient funds . . . to pay supplemental annuities. . . ." 26 U.S.C. § 3221(c). For the second quarter of 1980, that rate is 12.5 cents for each such man hour. 45 Fed. Reg. 13242.

[5] Section 3(e) of the 1937 Act, as amended by § 8 of the 1951 amendments (65 Stat. 685) among others, 45 U.S.C. § 228c(e). A similar guarantee is contained in § 3(f)(3) of the 1974 Act, 45 U.S.C. § 231b(f)(3).

within the railroad retirement system while retaining all its earlier staff pension elements." CRR Report, at 7-8.

At the same time in 1951, however, the Congress adopted an amendment intended to confine "the Railroad Retirement System . . . to its original purpose" of meeting "the retirement needs of railroad career employees" who "make railroading their life's work." [6] That amendment introduced a requirement that an employee have at least 10 years of railroad service to be entitled to any railroad retirement benefits upon retirement.[7] If less than 10 years, railroad service is transferred to the social security system and included with the individual's other employment in computing social security benefits.[8]

Length of railroad employment also historically has been the basis of several other distinctions favorable to long-service employees. (a) Eligibility for an employee annuity under § 2(a) of the 1937 Act generally was dependent upon attaining age 65. As initially enacted (50 Stat. 309), however, employees with 30 or more years of railroad service could retire on a reduced annuity at age 60 and were eligible for a disability annuity regardless of their age if disabled for work in any regular employment. (b) The reduction for age in the amount of the annuity payable to individuals with 30 or more

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[6] H. Rept. No. 976, 82d Cong., 1st Sess. (1951), at 47-48. See also, S. Rept. No. 890, 82d Cong., 1st Sess. (1951), at 14-16, 27, 56, 68.

[7] Section 2(a) of the 1937 Act, 45 U.S.C. § 228b(a), was amended by § 2 of the 1951 amendments (65 Stat. 683) to make at least 10 years of rail service one of the eligibility requirements for an employee retirement benefit. That requirement was carried forward into § 2(a)(1) of the 1974 Act, 45 U.S.C. § 231a(a)(1). Certain conforming changes were made in other provisions of the 1937 Act and are now contained in the 1974 Act.

[8] Section 5(k)(1) of the 1937 Act, as amended by § 22(a) of the 1951 amendments (65 Stat. 687), 45 U.S.C. § 228e(k)(1), and included in the 1974 Act as § 18(2), 45 U.S.C. § 231q(2).

years of service who retired prior to age 65 was eliminated as to women by a 1946 amendment (60 Stat. 727) and as to men by a 1973 amendment (87 Stat. 162). (c) The 1946 amendment also reduced from 30 to 10 the number of years of railroad service necessary for payment of a disability annuity to individuals disabled for work in any regular employment, and authorized the payment of such an annuity also to individuals who, among other things, had 20 or more years of railroad service if disabled for employment only in their regular railroad occupation rather than for regular employment of any kind. Those exceptions to the age-65 requirement, as contained in § 2(a) of the amended 1937 Act (45 U.S.C. § 228b(a)), are now included in § 2(a)(1) of the 1974 Act (45 U.S.C. § 231a(1)).[9]

In addition, a 1966 amendment added a provision, as § 3(j)(1) of the 1937 Act (80 Stat. 1073), for the payment of supplemental annuities (over and above the amount of the annuities normally payable) to individuals who, among other things, had 25 or more years of service and had attained age 65. Those provisions of the 1937 Act (45 U.S.C. § 228c(j)(1)) are included in § 2(b)(1) of the 1974 Act (45 U.S.C. § 231a(b)(1)) as revised to permit the payment of supplemental annuities also to otherwise eligible individuals with 30 or more years of service who have attained age 60.

(3) The primary purpose of the railroad retirement system to provide retirement benefits for career railroad employees also historically has been reflected in provisions that favor individuals who maintained an employment relationship or current connection with the railroad

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[9] Section 2(a)(1) of the 1974 Act also adopted and continued other exceptions to the age-65 requirement under which employees with 10 or more years of railroad service may qualify for a reduced annuity upon attaining age 62, and disability benefits are payable at age 60 to otherwise eligible employees.

industry. Indeed, such provisions are traceable, at least in part, to one of the reasons assigned by this Court in the *Alton* case for holding the Railroad Retirement Act of 1934 to be unconstitutional. See n. 1, p. 3, *supra*, and accompanying text.

Among other things, the 1934 Act made "eligible for pensions all who were in carrier service within one year prior to its passage, irrespective of any future reemployment." 295 U.S., at 348. This included persons who had permanently left railroad service, whether because discharged for cause or to take employment in some other industry, as well as those who were "merely on furlough" from railroad service or "temporarily relieved from duty subject to call . . . ." *Ibid.* The majority concluded that it was "arbitrary in the last degree," and thus a violation of Due Process, "to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service," or who otherwise were permanently separated from railroad employment before the statute was enacted. *Id.*, at 349. And while the four dissenters (Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo) disagreed with all the other bases for the *Alton* decision, they agreed that it was "arbitrary and beyond the power of Congress" to require the payment of annuities to persons who had "been discharged for cause" or had otherwise "left the service and may not return." *Id.*, at 389.

That defect was remedied in the 1937 Act by provisions under which only employees on the enactment date could receive credit for prior service[10] (§ 3(b), 50 Stat. 310),

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[10] The term "enactment date" was defined in § 1(j) of the 1937 Act to mean August 29, 1935 (50 Stat. 309, 45 U.S.C. § 228a(j)). That was the enactment date of the 1935 Act (49 Stat. 967), which contained generally similar provisions in §§ 1(b) and (d) (49 Stat. 968).

but defined "employee" to include both persons actually engaging in railroad service for compensation and those having an "employment relation" with a carrier (§ 1(b), 50 Stat. 308). An "employment relation" was defined generally to include persons on furlough subject to recall or on leave of absence, in accordance with the established rules and practices of the employing carrier (§ 1(d), 50 Stat. 308). In a 1946 amendment (60 Stat. 725), however, the definition of "employment relation" was revised, principally by eliminating the reference to persons on furlough and to include persons "in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive . . . ." Section 1(d) of the 1937 Act as so revised (45 U.S.C. § 228a(d)) is included in the 1974 Act as § 1(e) (45 U.S.C. § 231(e)).[11]

The Congress so revised the definition of "employment relation" because the initial definition had worked in a manner deemed to be "unjustifiable by standards of equity" in that some persons were denied credit for pre-enactment service even though they "had not gone into other employment, still considered themselves part of the railroad industry, expected to return when employment improved, and did in fact return in seniority order when the industry required their services," while some of the persons who could receive credit for pre-enactment service "had actually left the railroad industry and . . . never returned to it." S. Rept. No. 1710, 79th Cong., 2d Sess. (1946), at 7-8. The Congress sought to "correct both" inequities "by extending prior service credit to those who have returned and served for at least 6 months" while denying such "credit to those who had left the industry and have made no contribution." *Ibid.*

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[11] The provisions in the 1937 Act defining "employee" (45 U.S.C. § 228a(b)) and governing the credit of prior service (45 U.S.C. § 228c(b)) are included in the 1974 Act as § 1(b) (45 U.S.C. § 231(b)) and § 3(i)(3) (45 U.S.C. § 231b(i)(3)).

The 1946 amendments also introduced into the 1937 Act the related concept of a "current connection with the railroad industry," which as defined in § 1(o) of the amended Act (60 Stat. 726) generally required at least 12 months of railroad service during the 20 months preceding the individual's retirement or death. Among other things, the 1946 amendments made the existence of a "current connection" a prerequisite for the payment of benefits to survivors of a deceased employee under § 5 of the amended Act (60 Stat. 729) and for the payment of benefits to employees disabled for work in their regular railroad occupation under § 2(a) of the 1937 Act as revised by the 1946 amendments (60 Stat. 727; see p. 7, *supra*). Murray W. Latimer, then the Chairman of the Railroad Retirement Board, testified that the "current connection" requirement "attempted to divide persons who have worked in the railroad industry" between those "who are regular railroad employees and those who are not." [12] While it "attempts to substitute another concept for the concept of employment relation," it "has the same aim in view," and was proposed because the "definition of 'employment relationship' . . . would not easily be applicable to a continuing situation" and would be very difficult to administer.[13]

The 1937 Act continued thereafter to require a "current connection" as defined in § 1(o), 45 U.S.C. § 228a (o), with respect both to eligibility for survivor benefits under § 5, 45 U.S.C. § 228e, and to eligibility for certain disability benefits under § 2a, 45 U.S.C. § 228b(a). And, when the Congress amended the 1937 Act in 1966 to provide for the payment of a supplemental annuity to certain long-term railroad employees (see p. 7, *supra*), a "current connection" was made one of the eligibility requirements therefor (§ 3(j)(1), 80 Stat. 1073). All

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[12] Hearings on H.R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1946), at 168.

[13] Hearings on H.R. 1362, *supra* at 49, 168-169.

of those aspects of the 1937 Act were carried over into and are now part of the 1974 Act. A "current connection" is defined in § 1(o) (45 U.S.C. § 231(o)); and is required as to disability benefits under § 2(a)(1)(iv) (45 U.S.C. § 231a(a)(1)(iv)), as to a supplemental annuity under § 2(b)(1) (45 U.S.C. § 231a(b)(1)), and as to survivor annuities under § 2(d)(1) (45 U.S.C. § 231a (d)(1)).

B. The Windfall Dual Benefit Problem and the Report of the Commission on Railroad Retirement.

(1) While the railroad retirement system always has been separate from the social security system as to both the benefits payable and the taxes imposed to finance those benefits, in time the two systems were partially coordinated so that the railroad retirement system in essence consisted of a level of benefits and taxes generally equivalent to those paid or imposed by the social security system and a second or "staff" level providing additional benefits and imposing additional taxes. Insofar as the 1937 Act was concerned, this partial integration largely was accomplished by 1951 amendments that generally guaranteed a minimum level of railroad retirement benefits equivalent to what social security would pay (see pp. 5-6, *supra*) and that provided for a financial interchange between the two systems (65 Stat. 687). Under the financial interchange, the railroad retirement system turns over to the social security system that portion of railroad retirement taxes equivalent to what social security would have collected and receives back from social security amounts equivalent to whatever additional benefits that that system would have paid, if railroad employment were included within the social security system. See CRR Report, at 8.[14]

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[14] Thus, with respect to an individual who had both railroad and nonrailroad service, the social security system determines the amount that would be payable to him under that system if it

(2) Individuals could continue to qualify for benefits under both systems, however, both in their own right and as spouses or survivors, through employment—for both railroads and for other businesses (or self-employment) covered by social security—sufficient to meet the minimum length-of-service requirements of both the railroad retirement system (10 years of railroad service) and the social security system (generally 40 quarters of employment). Upon retirement, therefore, such individuals were paid benefits for which they were otherwise qualified by both the railroad retirement and the social security systems.

There is nothing inequitable, of course, in the payment of benefits under both systems to persons who qualify under both systems by reason of work for both railroad and nonrailroad employers. That continues to be done after, as well as before, enactment of the 1974 Act. The problem was that, before the 1974 Act more fully coordinated the social-security-level of benefits under the two systems, the weighting of the formula under which social security benefits are computed resulted in dual beneficiaries receiving total social-security-level benefits that substantially exceeded the benefits that social security would have paid on the basis of combined railroad and nonrailroad service.[15]

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applied to a combination of his railroad and nonrailroad service, deducts the amount it actually pays him on the basis of his nonrailroad service and credits the railroad retirement system with the remainder. If he had only railroad service, the full amount of what social security would have paid on the basis of that service is credited to the railroad retirement system. The financial interchange was provided for in § 5(k)(2) of the amended 1937 Act, 45 U.S.C. § 228e(k)(2), and is now provided for in § 7(c)(2) and (3) of the 1974 Act, 45 U.S.C. § 231f(c)(2) and (3).

[15] Under the Social Security Act, benefits as compared to service and compensation are higher in regard to relatively short service and low wage employees than in regard to those with relatively long service and high wages; however, artificial distortions result-

It was that excess or "windfall" amount which the Commission on Railroad Retirement identified and condemned as inequitable. See, *e.g.*, CRR Report, at 4, 8-9, 24, 353-355. "Windfalls in dual benefits seriously distort the benefit system for railroad workers and their families. They cause workers who serve the railroad industry for shorter periods to receive higher combined RR/OASDI benefits for their contribution dollar than career workers who spend their entire lives in the industry." CRR Report, at 355. The Congress that enacted the 1974 Act agreed that such windfall dual benefits "are inequitable in the sense that a minority of railroad employees receive an advantage not available either to the majority of career railroad employees—those who spend their entire working life in the railroad industry—or to employees in other private industries." [16]

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ing from work for more than one employer are avoided by combining service for and compensation from all employers subject to the Act in computing both benefits and taxes. On the other hand, the social security portion of railroad retirement benefits was computed on the basis of railroad service alone, rather than on the basis of all employment and compensation, so that the effect of the weighting of the social security benefit formula was artificially enhanced if the individual also worked for one or more nonrailroad employers. See, *e.g.*, CRR Report, at 112-113, 128-129, 349-350, 474. To give a simplified hypothetical example, if 10 years of service under social security would produce a monthly benefit of $300, an additional 10 years under that system at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to, say, $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the social security component of the railroad retirement benefit would also be $300, for a total social-security-level benefit of $600, since in each instance the weighted social security formula would be applied to only 10 years of service. The $100 difference in the example constitutes the "windfall."

[16] H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974), at 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974), at 11. Hereinafter, in instances where those committee reports on the bill enacted as the 1974 Act are identical (or substantially identical) in substance and in pagination, they will be jointly cited as "Committee Reports" together with the page or pages appropriate to both.

The windfall dual benefit problem was not limited, moreover, to those artificial and inequitable distortions in the amounts of social-security-level benefits. Even though those windfall amounts resulted from nonrailroad employment of railroad employees and from the social security benefit formula, under the financial interchange the entire cost of such excess or windfall benefits was borne by the railroad retirement system.[17] By 1974, the cost to the railroad retirement system was "in excess of $4 billion," and was responsible for 7.72% of the 9.05% (of taxable payroll) actuarial deficit in the railroad retirement account,[18] so that it was primarily those costs which "threaten[ed] the existing system with bankruptcy." [19]

(3) Because of concern about the solvency of the railroad retirement system (see CRR Report, at 5), when the Congress in 1970 enacted a 15% general increase in the level of benefits payable, it also established the Commission on Railroad Retirement to conduct a study of the system "for the purpose of recommending to the Congress on or before July 1, 1971, changes in such system to provide adequate levels of benefits . . . on an actuarially sound basis" (84 Stat. 791, 793), and it provided that the 15% increase was to expire on June 30, 1972. A 1971 statute (85 Stat. 101) allowed the Commission an additional year, until June 30, 1972, in which to make its report; enacted a further 10% general increase in the level of railroad retirement benefits; and provided that both that increase and the earlier 15% increase would expire on June 30, 1973.

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[17] Committee Reports, at 2-3; CRR Report, at 8-9, 24, 73, 129-130, 344. See ns. 14 and 15, pp. 11 and 12 *supra*.

[18] Committee Reports, at 2, 7-8.

[19] Committee Reports, at 1-2; see, also, *id.*, at 7-8.

The Report of the Commission on Railroad Retirement (see p. 5, *supra*), dated June 30, 1972, already has been referred to from time to time herein. Among other things, it identified "dual benefits and their attendant windfalls" as a "key problem," the solution of which "is crucial because it involves heavy costs and large considerations of equity, and also reflects a major structural imperfection in the system." CRR Report, at 24. The Commission recommended that future accruals of windfall benefits be eliminated by establishment of a two-tier system. The first tier would consist of social security benefits (and taxes), to be provided by making the Social Security Act (and FICA) directly applicable to railroads and their employees, so that such benefits would be computed under that Act on the basis of combined railroad and nonrailroad employment and "the excess element will automatically be eliminated." CRR Report, at 24; see, also, *id.*, at 3-4, 21-23. The second tier would consist of "a separate, supplementary railroad staff pension system," based upon railroad employment alone, "with taxes and benefits set under Federal law administered by the Railroad Retirement Board." CRR Report, at 23; see, also, *id.*, at 3-4, 21-22.

The Commission also recommended that "legally-vested rights of railroad workers and railroad retirement beneficiaries" to a windfall dual benefit be preserved. CRR Report, at 4. Under the Report's definition of "legally vested," "vested benefit" and "vesting" (pp. 552, 555), this meant that persons already retired and receiving such a windfall as of the changeover date to the new two-tier system would continue to receive the same windfall amount, and that persons not yet retired (and their spouses and survivors) who, as of that changeover date, had sufficient railroad and nonrailroad employment to satisfy the minimum length-of-service requirements of both the railroad retirement and social security systems would, upon retirement, be paid a windfall amount based

upon such service prior to the changeover date. Persons not so vested but who, by reason of both railroad and nonrailroad employment prior to the changeover, had paid social-security-level taxes in excess of what would have been paid under social security if applicable to a combination of that employment, would have that excess refunded by a lump-sum payment. CRR Report, at 24. In addition, the Commission recommended that the benefit formula applicable to the second tier of benefits be restructured to eliminate a "compounding" problem that threatened to "escalate costs to an untenable extent" and to correct other "anomalies" so as to "make benefits more equitable among the various groups of beneficiaries." CRR Report, at 4-5.[20]

(4) The Congress did not act immediately upon the Commission's recommendations. In a 1972 statute which enacted a third general increase (20%) in the level of railroad retirement benefits, the Congress scheduled that increase to expire also on June 30, 1973 and expressly stated "the policy of the Congress" that the three temporary increases "can be made permanent only if at the same time a method is adopted to insure the receipt of sufficient revenues by the Railroad Retirement Account to make such Account financially solvent based on sound actuarial projections" (86 Stat. 765, 767); and the Congress called upon "representatives of employees and retirees and representatives of carriers" to submit a report,

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[20] The "compounding" problem generally resulted from the fact that percentage increases in the level of benefits, intended to provide more adequate benefits "for beneficiaries already on the rolls whose wage base reflects earlier years when pay rates were lower," had "also been applied to new retirees whose wage base is related to more recent, higher wages." CRR Report, at 24-25. The correction recommended in regard to relative benefits was a substantial enhancement of survivor benefits. CRR Report, at 26. The Commission also contemplated that the temporary benefit increases would "become permanent" under the restructured system. CRR Report, at 23.

not later than March 1, 1973, of their recommendations in that regard, after "taking into account" the Commission's recommendations. And in a 1973 statute, the Congress extended the expiration date of the three temporary increases to December 31, 1974, and provided for the formal establishment of a joint labor-management railroad retirement negotiating committee to submit, not later than April 1, 1974, "their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system," which recommendations "shall take into account the specific recommendations" of the Commission "and shall be specific and shall be presented in the form of a draft bill" (87 Stat. 162, 165).

C. The Enactment of the Railroad Retirement Act of 1974 and Its Solution of the Windfall Dual Benefit Problem.

(1) The Joint Labor-Management Railroad Retirement Negotiating Committee (hereinafter the "Joint Committee") reached an agreement upon the principles to be embodied in a draft bill, and so advised the Congress in an April 10, 1974 letter which outlined those principles in considerable detail.[21] A bill embodying those principles subsequently was drafted and submitted to the Congress where it was introduced as H.R. 15301 and S. 3612. After

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[21] An identical letter was addressed to the Chairmen of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Labor and Public Welfare. It was published in the Congressional Record for June 10, 1974, 120 Cong. Rec. 18391, and was included in committee prints of background information. *Background Information Relating to Proposed Changes in the Railroad Retirement System*, House Committee Print No. 24, 93d Cong., 2d Sess. (June 10, 1974), at 7-18; *Proposed Changes in the Railroad Retirement System, 1974, Background Material, Draft Legislation, and Recommendations Pursuant to Public Law 93-69*, Unnumbered Senate Committee Print, 93d Cong., 2d Sess. (August 1974), at 7-18.

lengthy hearings before committees of both Houses,[22] those committees issued detailed reports (see n. 16, p. 13, *supra*) recommending adoption of the bill with some changes, and it was enacted in October of 1974 by virtually unanimous votes overriding a presidential veto.[23] While many of the features of the 1937 Act were retained (including generally the types of benefits provided and the eligibility requirements therefor), the legislation did restructure the railroad retirement system in a manner which the congressional committees concluded would place the system "on a sound financial basis." [24] Among other things, the legislation adopted a two-tier system in substance, although not in the form recommended by the Commission on Railroad Retirement,[25] and by that and other means to be discussed resolved the windfall dual benefit problem.

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[22] Hearings on H.R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (July 25, 30, 31, and August 1, 1974), hereinafter the "House Hearings." Hearings on S. 3612 before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (September 5 and 10, 1974), hereinafter the "Senate Hearings."

[23] See 120 Cong. Rec. 35616, 35898. Title I constitutes the 1974 Act. Title II includes transitional provisions applicable to beneficiaries who retired prior to January 1, 1975, and the remaining titles involve conforming amendments of other statutes and effective dates (generally January 1, 1975).

[24] See, *e.g.*, Committee Reports, at 1, 14, 17-18.

[25] See, *e.g.*, Committee Reports, at 18-19. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad employment, while the second tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to prevent duplication. The 1974 Act also adopted a new benefit formula for the second tier which, as the Commission had recommended, had the effect of eliminating the "compounding" problem and of making permanent the three temporary increases in benefit levels (see n. 20, p. 16, *supra*) amounting to "about 52% on a cumulative basis" (Committee Reports, at 19-20); and it enhanced the level of survivor benefits (in general, from 110%

(2) That was done in the context of a situation where, if "the existing system [was] permitted to continue, the Railroad Retirement system [would] be bankrupt by 1981, and there [would] be insufficient funds available to pay benefits at the present level to anyone—past, present or future beneficiaries." Committee Reports, at 7. The Congress recognized, as did the Joint Committee (120 Cong. Rec. 18391), that "[r]esolution of the so-called 'dual benefit' problem is central both to insuring the fiscal soundness of the railroad retirement system and to establishing equitable retirement benefits for all railroad employees." Committee Reports, at 11. The "fundamental step" toward resolution of the problem was the establishment of the two-tier system under which "a 'windfall' no longer will be possible except insofar as the bill expressly preserves benefits for those beneficiaries and employees whose equities entitles them thereto." *Ibid.* The "most difficult problem" was the "manner in which dual benefits should be phased out on an equitable basis." *Ibid.*

The Committee Reports (at pp. 11-12) carefully described the 1974 Act's solution of that "most difficult problem" as follows:

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to 130% of the social security level) for both existing and future beneficiaries, as recommended by the Commission, and broadened an early-retirement provision adopted in 1973 (*id.*, at 17, 18). Under the 1973 amendment to the 1937 Act, an employee with 30 or more years of railroad service could retire at age 60, but he was not eligible for a supplemental annuity and his spouse was not eligible for a spouse annuity until he was 65. Since those limitations had proven to be a "significant deterrent" to effectuation of the purpose of the 1973 amendment to encourage early retirement by long-service railroad employees, the Joint Committee recommended (see, *e.g.*, 120 Cong. Rec. 18392-18393) and the 1974 Act contains provisions under which a supplemental annuity also is payable to such an early retiree (§ 2(b)(1)(i), 45 U.S.C. § 231a (b)(1)(i)), and a spouse annuity may be paid to his spouse (§ 2 (c)(1)(i), 45 U.S.C. § 231a(c)(1)(i)). See Committee Reports, at 17.

"First, the dual benefits of beneficiaries on the rolls as of January 1, 1975 would continue to be paid in full. However, the [windfall] portion of those dual benefits . . . would not be subject to future increases in the level of social security benefits. In effect, therefore, the amount of that portion will be frozen as of December 31, 1974. This is the approach recommended by the Commission on Railroad Retirement.

"Second, employees without sufficient railroad and non-railroad service and compensation by December 31, 1974 to have fully qualified under both systems would not be entitled to a [windfall] dual benefit. . . . In addition, however, such an employee upon retirement (or his survivors if he should die before retirement) would be entitled to a lump-sum refund of employment taxes paid under the Railroad Retirement and Social Security Acts prior to January 1, 1975 in excess of what would have been paid if all of his employment prior to that date had come under the Railroad Retirement Act. Again, this is what the Commission on Railroad Retirement recommended.

"Third, employees who have sufficient service and compensation to be fully qualified under both systems but who have not retired prior to January 1, 1975 would be divided into two classes or groups.

"The first group would be comprised of those employees with a 'current connection' with the railroad industry—12 months of railroad service out of the previous 30 months, as defined in the 1937 Act and in the bill—either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service [as of January 1, 1975] even though without such a 'current connection.' This group also would receive, upon retirement, a [windfall] dual benefit based upon service and compensation prior to January 1, 1975.

> The amount thus determined . . . would be subject to increase prior to retirement by reason of cost-of-living increases in the level of social security benefits during that intervening period, but would be frozen upon retirement, as would be done in the case of dual beneficiaries retired as of December 31, 1974.
>
> "The second group would be composed of employees who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection to the railroad industry. Under the bill, they would not receive a [windfall] dual benefit upon retirement, unless they also had fully qualified under Social Security by the close of the year prior to 1975 in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid). If they had so qualified under both systems at that point, however, they would receive [windfall] dual benefits, upon retirement, calculated as of the time they left railroad service, and subject to cost-of-living increases in the level of social security benefits after 1974 and prior to retirement. The excess benefit would be frozen upon retirement, as in the case of other dual beneficiaries.
>
> "The bill also contains generally similar provisions for terminating or phasing out [windfall] dual benefits of spouses and survivors of railroad employees."

In its April 10, 1974 letter to the Congress, the Joint Committee similarly outlined its recommended solution of how windfall dual benefits should be phased out (which recommendation was approved by the congressional committees and enacted by the Congress) as between the same three classes of employees, the third of which was divided into two groups. 120 Cong. Rec. 18391-18392. The Joint Committee also informed the Congress, in that letter, that the recommended solution in regard to that third class "differ[ed] from the Commission's" in thus

dividing it into two groups; and that while the first such group was believed to be "entitled to be in the same situation" as persons who had retired as of the changeover date, the second group "have a less strong equitable claim than those who have remained with the industry" so that they should receive a preserved windfall benefit, upon retirement, only if they had qualified under both systems as of the end of the year in which they left railroad service. 120 Cong. Rec. 18392.[26]

(3) That solution is, of course, reflected in the bill enacted in 1974. With respect to employees in the first classification—those who retired prior to the changeover date—any windfall amount as of that date is preserved by §§ 204(a)(3) and (4).[27] With respect to employees in the second classification—unretired employees who had not qualified under both systems as of the changeover date—no provision preserves a windfall amount, so that none is payable upon retirement to such persons, their spouses or survivors. With respect to employees in the

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[26] The Section-by-Section Analysis of the Bill, contained in the Committee Reports, includes even more detailed explanations of the windfall provisions (pp. 38-39, 42-43 (or 43-44), 44 (or 45), 47-48, 59, 60 (or 61)). The three classifications established in that regard, including the division of the third classification into two groups, also were explained in the testimony of William H. Dempsey (House Hearings, at 167-169; Senate Hearings, at 340-345) and of C. L. Dennis (House Hearings, at 221; Senate Hearings, at 293). Mr. Dempsey, who was then Chairman of the National Railway Labor Conference, was the chairman of the management members of the Joint Committee. Mr. Dennis, who was then President of the Brotherhood of Railway and Airline Clerks, was the chairman of the labor members of the Joint Committee and was one of the members of the Commission on Railroad Retirement.

[27] 88 Stat. 1353. The transition provisions in Title II of the bill are not included in the U.S. Code. Any windfall amount of spouses and survivors on the beneficiary rolls as of January 1, 1975 are preserved by §§ 206(3) and 207(3), 88 Stat. 1355, 1356. All such preserved windfall amounts are excluded from future cost-of-living increases, equivalent to those afforded by social security, provided under § 209(a), 88 Stat. 1357.

third classification—unretired employees who had qualified under both systems as of the changeover date—the further division of that class into two groups is reflected in § 3(h), 45 U.S.C. § 231b(h). Under §§ 3(h)(1) and (3), any windfall amount as of the changeover date is preserved for such employees if they had railroad service in 1974 or 25 or more years of railroad service by that date or a current connection either as of that date or when they retired; and under §§ 3(h)(2) and (4), for such employees that do not meet any of those three requirements but were qualified under both systems by the end of the year they left railroad service, any windfall amount as of the end of that year is preserved.[28] The lump-sum payment refunding excess taxes to employees who do not have a windfall amount preserved is provided under § 5(d), 45 U.S.C. § 231e(d).

One of the three circumstances which, under §§ 3(h)(1) and (3), entitles an unretired employee, upon retirement, to a preserved windfall amount as of the changeover date—some railroad service in 1974—essentially is redundant.[29] Thus, the Congress fundamentally

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[28] The preserved windfall amounts are increased by percentages equivalent to cost-of-living increases in social security benefits, between January 1, 1975 and the date of retirement, under § 3(h)(5). Similar provisions in regard to the spouses and survivors of such employees are contained in §§ 4(e) and 4(h), 45 U.S.C. §§ 231c(e) and (h).

[29] If that factor had been omitted, an employee who left railroad employment after some service in 1974 would be entitled to precisely the same preserved windfall amount under §§ 3(h)(2) and (4), since under those provisions he had until the end of the year in which he left railroad service to qualify under both systems and the preserved windfall amount is calculated as of the end of such year. And, of course, if he continued in railroad service through 1974, such an employee would have a current connection as of January 1, 1975. This redundancy explains why the circumstance of some railroad service in 1974 was not mentioned in the summary of the windfall provisions in the Committee Reports, quoted on pp. 20-21, *supra*, or in the April 10, 1974 letter. That circumstance, as well as the others, was specifically mentioned in the section-by-section analyses (Committee Reports, at 38-39).

distinguished between the two groups in the third classification on the basis of whether they had either 25 or more years of railroad service or a current connection with the railroad industry as of the changeover date or upon retirement. Both the long-term railroad service reflected in the 25-year provision and the continued attachment to the railroad industry reflected in a current connection are circumstances that the Congress historically has regarded as justifying favored treatment under the railroad retirement system, as is shown by numerous provisions of the 1937 Act which generally also were carried over into the 1974 Act. See pp. 5-11, *supra.*

The Congress also provided, in § 15(d) of the 1974 Act, 45 U.S.C. § 231n(d), for appropriations out of the General Treasury over a 25-year period of amounts sufficient to pay the future costs of the windfall benefits thus preserved, as offset by additional interest earned by the Railroad Retirement Account by reason of a change in investment policies provided in § 15(e) of that Act, 45 U.S.C. 231n(e). In general, the Congress concluded that it primarily was at fault in permitting the windfall dual benefit problem to arise, and that it would be inequitable to require the railroads, who received no advantage from the social security employment that gave rise to the windfalls, or the employees, who would be debarred from future accruals of windfalls, to bear those phaseout costs through future payments of employment taxes. See, *e.g.*, Committee Reports, at 2-7.

D. The Decision Below.

(1) The District Court conceded that this case "does not involve the deprivation of a fundamental right or . . . discrimination against a suspect class," so that the claimed deprivation of equal protection of the laws in violation of the due process clause of the Fifth Amend-

ment must be judged by the "rational basis test." C. 5-7, J.S. App. 28a. But the District Court also concluded that there was no rational basis for the denial in the 1974 Act of a preserved windfall dual benefit to what that court characterized as the "Plaintiff Class."

The "Plaintiff Class" was said to consist of persons with between 10 and 25 years of railroad service as of December 31, 1974 who were qualified or "vested" as of that date under both the railroad retirement and social security systems, but who neither had a current connection with the railroad industry as of that date nor worked for the railroad industry in 1974. It was contrasted by the trial court with a class or group of persons who had the attributes of the "Plaintiff Class" and also either had a current connection as of December 31, 1974 or who had worked for the railroad industry in 1974. C. 2, J.S. App. 27a. The distinction made by the Congress between that class and the "Plaintiff Class" was said to be based solely upon whether or not the individual concerned was "active" with the railroads in 1974. C. 4, J.S. App. 27a-28a. In addition to ignoring completely the first two classes distinguished by the Congress,[30] the "Plaintiff Class" thus distinguished by the lower court does not accurately reflect the manner in which the Congress divided its third class into two groups.[31]

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[30] *I.e.*, (1) those persons who had retired prior to January 1, 1975 and (2) those unretired persons who were not qualified under both systems prior to January 1, 1975. See pp. 22-23, *supra*.

[31] The basic distinction made by the Congress in regard to unretired persons who had qualified under both systems prior to January 1, 1975 was not between those who were "active" in 1974, in the sense of having had railroad service in that year or a current connection at the end of that year, and those who were not so "active," but between those who either had 25 or more years of railroad service as of the end of that year or a current connection either as of the end of that year or when they retired and those who neither had such long-term railroad service nor such a current connection with the railroad industry. See pp. 23-24, *supra*.

In any event, the District Court concluded that the "rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact;" that the purposes of the 1974 Act "were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons" who were qualified or "vested" under both systems as of December 31, 1974; and that the discrimination against the "Plaintiff Class" is "not rationally related" to either purpose. C. 8, 9 and 19, J.S. App. 28a, 30a. The District Court attempted to buttress the latter conclusion by conclusions regarding other "factors bearing adversely on the rationality of a statutory discrimination between similar situated persons" (J.S. App. 30a). In its opinion, other methods of resolving the "financial difficulties" of the railroad retirement system were available and preferable (C. 14, J.S. App. 29a); there was "reasonable reliance of the Plaintiff Class" on receiving a windfall benefit upon retirement (C. 15, J.S. App. 29a-30a); the union representatives on the Joint Committee breached a "duty of fair representation owed plaintiff's class" which "was sanctioned by Congress" in enacting the 1974 Act (C. 16, J.S. App. 30a); and the "Congress was unaware" that the 1974 Act "adversely affected the Plaintiff Class" (C. 17 and 18, J.S. App. 30a).

(2) We will demonstrate the legal defects in or irrelevancy of those conclusions in our Argument. This appears to be the most appropriate place, however, to comment upon the factual errors underlying certain of those conclusions which, together with related findings, cast completely unwarranted aspersions upon representatives of the railroads and the unions who participated in the proceedings of the Joint Committee.[32]

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[32] In addition, we note that the lower court's rulings to the effect that the discrimination against the group that includes the "Plaintiff Class" is not rationally related to the purpose of the Congress

With all due respect to the District Court, its conclusions to the effect that a purpose of the 1974 Act was "to protect competely" the rights to a windfall benefit of all persons who were qualified or "vested" under both systems as of December 31, 1974, and that the "Congress was unaware" that the "Plaintiff Class" would be denied a preserved windfall benefit, are nonsensical. Those conclusions are contradicted not only by the language of the bill which the Congress enacted, but also by the committee reports which explained what was being done in detail, including identification of the classes of persons affected and the circumstances in which they would and would not be entitled to a preserved windfall amount, together with an explanation of the nature and extent of that benefit when preserved. That was done not only in the general discussion of the bill's solution of the windfall dual benefit problem quoted at pp. 20-21, *supra*, but also in the section-by-section analyses of the provisions of the bill (see n. 26, p. 22, *supra*). To be sure, those reports contain general statements which in themselves do not spell out all of the distinctions made in the legislation, such as those quoted in F. 63-65 (J.S. App. 22a-24a), but that common occurrence does not in any way detract from the fact that the specific discussions of the windfall provisions demonstrate that the Congress both knew and intended exactly what the 1974 Act provides in that regard and that the group which includes the "Plaintiff Class" therefore would be adversely affected by those provisions.

The related finding of the trial court to the effect that members of the Joint Committee, and particularly Mr. Dempsey, misled the Congress in testimony on the recom-

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to place the railroad retirement system on an actuarially sound financial basis is erroneous factually, as well as legally, as it ignores the conclusion of the Congress that terminating windfall dual benefits was "central" to the achievement of that purpose. See p. 19, *supra*.

mended bill to "believe that the plaintiff class was protected by the" 1974 Act (F. 52, J.S. App. 15a) is a complete distortion of the legislative record, even apart from the fact that the Congress obviously was not so misled.

The language of § 3(h) of the bill before the Congress, which the Joint Committee had drafted at the direction of the Congress, itself made abundantly clear that the members of the group that included the "Plaintiff Class" would not be entitled to a preserved windfall benefit unless they had qualified under both systems by the end of the year in which they left railroad service. That was also made clear in the April 10, 1974 letter from the Joint Committee to the Congress, which was printed in the Congressional Record and also made available by the congressional committees as part of the background information to be considered by their members and other congressmen in passing upon the bill. See n. 21, p. 17 *supra*. It was again made clear in the written statement submitted by Mr. Dempsey to the congressional committees as a part of his testimony, as is revealed by the partial quotation from that statement in Finding 53, J.S. App. 17a-19a.

The lower court attempted to denigrate that statement by asserting that it "euphemistically refers to the discrimination against the plaintiff class as a 'refinement'" and "inaccurately defines the persons whose vested benefits were protected since it fails to disclose that persons who worked for the railroads even one day in calendar year 1974 also received their full benefits." J.S. App. 19a. Whether or not "euphemistic," the "refinement" was "upon the recommendations of the Commission on Railroad Retirement" and was believed by the Joint Committee "to be desirable in order to reflect more accurately the comparative equities of the two groups." J.S. App. 18a. More importantly for present purposes, that reference did not in any way obscure the disclosure by

Mr. Dempsey that the group which includes the "Plaintiff Class" would not be entitled to a preserved windfall except as they had qualified under both systems at the end of the year in which they left railroad service. That is also true of the alleged inaccuracy, which in any event simply involved a failure to mention a redundancy (see n. 29, p. 23, *supra*) and did not affect any member of the "Plaintiff Class."

The lower court also asserted that the explanation in Mr. Dempsey's written statement "was refuted by the oral testimony" set out in Finding 52. J.S. App. 17a-18a. Rather than "refuting" his written statement in his oral testimony, Mr. Dempsey explained that it was lengthy and "very detailed," so that instead of encroaching on the committees' time by reading the statement, which in any event "the members of the committee and the staff can do . . . much better" for themselves, he would focus his oral testimony on a more generalized discussion of what he regarded as the main or key issues. House Hearings, at 181; Senate Hearings, at 308. And, in fact, none of the excerpts in Finding 52 (J.S. App. 15a-17a) from Mr. Dempsey's testimony purported to give a detailed explanation of the manner in which windfall benefits would be phased out.[33]

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[33] The colloquy between Mr. Dempsey and Representative Dingell did not relate to windfall benefits, but was part of Mr. Dempsey's discussion of the new benefit formula for Tier II (see n. 25, p. 18, *supra*). Mr. Dempsey was explaining why that new formula would reduce the actuarial deficit, even though it would result in benefits as large or larger than those currently being paid under the 1937 Act—primarily because of its elimination for the future of the "compounding" problem which the Commission on Railroad Retirement had pointed out (see n. 20, p. 16, *supra*). See House Hearings, at 199; generally, at 197-205. The next excerpt is simply a generalized statement made by Mr. Dempsey in the course of explaining his views as to the manner in which the costs of phasing out windfall benefits should be funded (*see id.*, at 209-216), and Mr. Dempsey's colloquy with Senator Hathaway, as is apparent on its face, sets forth Mr. Dempsey's reasons for objecting to the Senator's

The lower court's conclusion, and related findings, to the effect that the unions breached their duty of fair representation to the "Plaintiff Class" and thus would have violated the law, if such breach had not been sanctioned by the Congress in enacting the 1974 Act, is equally fallacious. Even if the duty of fair representation had been applicable, which it was not,[34] it would not have been breached.

The asserted breach was an alleged agreement by the union representatives "during the critical negotiations to deprive the plaintiff class of their 'vested benefits' in exchange for liberalized benefits for others" (C. 16, J.S. App. 30a). Those "liberalized benefits" are the increase in the level of survivor benefits, as recommended by the Commission on Railroad Retirement, and the broadening of an early retirement provision to make it more effectual. See F. 40, J.S. App. 11a-12a, and n. 25, p. 18, *supra*. The members of the "plaintiff class" (or their survivors) are not excluded as such from qualifying for

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suggestion that the number of qualifying years be increased. Of course, the number of qualifying years required by existing law was utilized in the 1974 Act with regard to the group that includes the "Plaintiff Class" as well as with regard to the other classes or groups affected, and adoption by the Congress of the Senator's suggestion would have reduced the number of persons entitled to a preserved windfall amount both as to that group and generally.

[34] That duty is imposed by the Railway Labor Act and the National Labor Relations Act upon the "exclusive bargaining representative of the employees" in a bargaining unit with respect to the representation of those employees in collective bargaining and in enforcing bargaining agreements. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). The Joint Committee was not established pursuant to either of those Acts. Even if it had been, the union members would not have represented persons outside of the bargaining unit, such as former railroad employees including the members of the "Plaintiff Class." *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 171-175 (1977).

those liberalized benefits[35] and, as Mr. Dempsey made clear to the Congress, "they are either right or wrong on their own merits" and should be so judged by the Congress and not "confuse[d] in some way . . . with the phaseout dual benefit question." Senate Hearings, at 318; generally, at 317-318. And even if there had been a tradeoff in that regard, that would be permissible under the duty of fair representation.[36]

The Joint Committee, including its union members, was faced with a very difficult problem. Temporary general increases amounting to a cumulative 52% in existing benefit levels would expire at the end of 1974 unless new legislation was enacted, and there were predictions that the entire railroad retirement system would be bankrupt by 1981 unless something were done. In reaching agreement on proposed legislation that remedied those problems, the union greatly benefitted the members of the "Plaintiff Class" as well as other retirees and potential retirees. In phasing out windfall dual benefits, the class most advantaged—those who retired prior to January 1, 1975—were no longer members of the unions, while the class most disadvantaged—unretired employees

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[35] Of course, everyone must satisfy the qualifications for those benefits, including a current connection with respect to survivor benefits and 30 years of railroad service with respect to early retirement.

[36] A union does not violate the duty of fair representation by "taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). "The complete satisfaction of all who are represented is hardly to be expected" and a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

who had not qualified under both systems—made up the generality of the unions' current membership, so that factor obviously had nothing to do with the recommended legislation. And, the group which included the "Plaintiff Class," even though they had left railroad service, were given a preserved windfall if they had qualified under both systems by the end of the year they left such service and in any event if they returned to railroad service thereafter so as to have a current connection when they retire. And, if not entitled to a preserved windfall, they are entitled to a refund of excess employment taxes paid.

In short, the unions, like the carriers, made a good faith effort to accommodate the various interests involved so as to reach a reasonable settlement of an extremely difficult and complex problem. Whether or not that was the best of all possible settlements, it is highly unfair to characterize those efforts as a breach of the duty of fair representation. Such a characterization, if allowed to stand, can only make more difficult future efforts by the carriers and unions to resolve railroad retirement and other issues through compromise agreements which by their very nature cannot possibly fully satisfy the desires of everyone affected.

ARGUMENT

The foregoing Statement demonstrates that the Congress had a rational basis for the distinctions or classifications which it made in the 1974 Act with respect to the termination of windfall dual benefits. That being so, those statutory provisions undoubtedly are constitutional under principles established by this Court.

1. "Like Social Security . . . , railroad retirement benefits are not contractual," so the "Congress may alter, and even eliminate, them at any time" without violating the Constitution. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). Indeed, Fritz conceded, in his Motion to Affirm (p. 7), that it "is indisputable that Congress could have conclusively eliminated dual benefits for everyone." This means, among other things, that no one—including the members of the "Plaintiff Class"—had an indefeasible "vested" right to the payment of windfall dual benefits upon retirement.

The issue before the Court, therefore, is not whether the Congress deprived the "Plaintiff Class" or anyone else of "vested" rights. The issue, rather, goes to the constitutional validity of the judgment by the Congress as to the facts or circumstances sufficient to confer on some classes or groups an equitable claim to windfall dual benefits sufficiently strong to justify recognition in the 1974 Act while otherwise terminating completely any statutory entitlement to such benefits. While opinions obviously may differ as to the manner in which such equitable considerations should be balanced, it seems equally obvious that under our constitutional system such policy judgments basically are for the Congress to make in enacting Federal legislation.

2. In his Motion to Affirm, Fritz did not contest—and appears to have conceded (at p. 7)—the holding of the District Court (see p. 24, *supra*) that this case "does

not involve the deprivation of a fundamental right . . . or discrimination against a suspect class." In any event, that holding undoubtedly is correct. See, *e.g.*, *Maher* v. *Roe*, 432 U.S. 464, 470-471 (1977); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312-314 (1976); *San Antonio School District* v. *Rodriquez*, 411 U.S. 1, 16-39 (1973). A "fundamental right" for these purposes is one "explicitly or implicitly guaranteed by the Constitution" (*Rodriquez*, at 33-34), and as we have shown it is well established that there is no constitutional right to railroad retirement benefits. And, the classifications in the 1974 Act regarding windfall dual benefits plainly are not based upon race, color, ancestry or nationality, alienage, gender or any other factor that has been held, or even seriously contended to be, the hallmark of a "suspect" class. In short, this is not a case that calls for "strict scrutiny" of the statutory classifications or demands a showing that they are necessitated by some "compelling" governmental interest.

We assume, however, that it is true of railroad retirement, as it is of social security, that the Congress may not "exercise its power to modify the statutory scheme free of all constitutional restraint," in that the equal protection of the laws included within the Due Process Clause of the Fifth Amendment must be afforded; but the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). See also, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971).[37]

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[37] Both *Salfi* and *Belcher* are among the many cases pointing out that a Federal statute "is perforce consistent with the due process requirement of the Fifth Amendment" if it would satisfy the standards applicable to the States under the Equal Protection Clause of the Fourteenth Amendment. See 422 U.S., at 770; 404 U.S., at 81. In our further discussion, therefore, we rely upon decisions by this Court under the Fourteenth, as well as those under the Fifth, Amendment.

Consequently, the statutory classifications adopted by the Congress in the 1974 Act do not violate equal protection unless the "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979).

3. In determining whether such a rational basis exists, it is necessary to begin "with the statutory classification itself," *Califano* v. *Boles*, —— U.S. ——, 47 U.S.L.W. 4874, 4877 (1979). And, the "broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977).[38]

The rationality of the statutory classification at issue here is plain when considered in the light of the background and history of the 1974 Act which we have set forth in our Statement of the Case. Very generally, the Congress was faced with the prospect that the railroad retirement system would be bankrupt within a few years, and thus unable to pay benefits to anyone, unless something was done to restructure the system on a sound financial basis. It concluded that the principal cause of the system's financial difficulties, and the key to solving that problem as well as to providing a more equitable system of benefits, was the windfall dual benefit situation. Such windfall benefits not only were inequitable in themselves, but their cost was borne entirely by the railroad retirement fund even though they resulted from employment covered by the social security system. See pp. 12-14, 19, *supra*.

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[38] Hence, the District Court erred in focusing upon a "Plaintiff Class" that differed in characteristics from the statutory classification adopted by the Congress. See p. 25, *supra*. This is also true, of course, of the similar arguments made by Fritz such as those on pp. 8-9 of his Motion to Affirm.

Thus, it unquestionably was proper for the Congress to enact legislation for the purpose of restoring and protecting the financial integrity of the railroad retirement system which it established,[39] and to restructure that system so as to coordinate it with the social security system—which the Congress also had established—in a manner that would remedy the windfall dual benefit problem. See, *e.g.*, *Richardson* v. *Belcher*, *supra* at 82-84. That could have been done by terminating windfall benefits altogether (see p. 33, *supra*), but a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976). In that case, the Court upheld a "grandfather provision" in an ordinance terminating the sale of foodstuffs by pushcart vendors, which excepted those vendors that had engaged in that business for eight or more years. In so doing, the Court concluded that the "city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation," and for that reason, among others, the "grandfather provision" did not "so lack rationality" as to "constitute a constitutionally impermissible denial of equal protection." *Ibid.*

The determinations by the Congress as to what classes should in effect be "grandfathered" in regard to windfall dual benefits are as much or more reasonable and rational. It certainly is rational to believe that the "reliance interests" and other equities in regard to a wind-

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[39] See, *e.g.*, *Califano* v. *Boles*, *supra* at 4878; *Matthews* v. *Diaz*, 426 U.S. 67, 83 (1976); *Weinberger* v. *Salfi*, *supra* at 780. The Congress, like the States, "has a legitimate interest in maintaining the self-supporting nature of its [retirement] program," *Geduldig* v. *Aiello*, 417 U.S. 484, 496 (1974), and has "a wider latitude in choosing among competing demands for limited public funds" as the "appropriate forum for their resolution in a democracy is the legislature," *Maher* v. *Roe*, *supra* at 479. And see, *e.g.*, *Califano* v. *Torres*, 435 U.S. 1, 5 n. 7 (1978); *Jefferson* v. *Hackney*, 406 U.S. 535, 549 (1972).

fall dual benefit are more substantial on the part of those who have demonstrated their attachment to and dependence on the railroad industry by 25 or more years of service or a current connection with that industry, than on the part of those employed by the railroads for a lesser period of time who left railroad service sufficiently in advance of enactment of the 1974 Act as not to have a current connection on the changeover date and did not return to that industry so as to have a current connection when they retire.

This is particularly so since both long-term railroad service and the existence of a "current connection" (or the related concept of an "employment relation") traditionally have been factors which the Congress has considered to justify more favorable treatment under the railroad retirement system. See pp. 5-11, 23-24, *supra*, and compare *Matthews* v. *Diaz*, *supra* at 78 n. 1 and accompanying text, and *Weinberger* v. *Salfi*, *supra* at 777-780.[40] It hardly could be otherwise under a system which from the beginning has primarily been intended to provide "benefits for persons who pursue careers in the railroad industry," so as, among other things, to "encourage older workers to retire" from the industry and thus " 'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, *supra* at 573-574. Preservation of a windfall benefit for persons, such as the members of the "Plaintiff Class," who already had permanently left railroad service and who did not return to that service before retirement would not further that purpose. And it has continued to be true, as it was when the *Alton* case

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[40] See, also, *Califano* v. *Jobst*, *supra* at 57, which upheld the rationality of an exception to the payment of social security benefits to dependent children because, among other things, the factors governing application of that exception did not "introduc[e] any new concepts into the administration of the [social security] trust fund . . . ."

was decided in 1935, that many of the persons who permanently leave railroad service before retirement do so because they were discharged for cause or preferred employment with some other industry, and thus have no substantial equitable claim to railroad retirement benefits. See pp. 8-9, *supra*.

Thus, there is no substance to the contention by Fritz (Motion to Affirm, at 8) that the "only distinction between the protected and unprotected classes essentially amounts to the timing of their railroad services . . . ," even if timing alone would not be sufficient—a proposition for which Fritz has shown no support. We note, moreover, that Fritz does not contest that aspect of the classification adopted by the Congress preserving a windfall benefit for employees with 25 or more years of service. He concedes that "the setting of arbitrary periods of service as eligibility requirements does not implicate the equal protection clause" and that it "is reasonable to classify railroaders with more than 25 years as 'career' railroaders who are in a different position than those with 10-25 years of service" (Motion to Affirm, at 8 n. 4). So, too, Fritz "has no dispute with the determination to deny dual benefits to those with less than ten years of service, as the ten-year mark has historically and reasonably divided vested and non-vested railroaders" (*ibid.*). We submit that it is equally reasonable to classify "railroaders" who maintain a current connection with the railroad industry "as 'career' railroaders who are in a different position than those" who had permanently left railroad service, particularly since the existence of a current connection "has historically and reasonably" been a criterion of eligibility for various benefits under the railroad retirement system.

4. It "is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Fleming* v. *Nestor*, *supra* at 612, as "[l]egislatures are

presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them," *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971). See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).[41] And, for that matter, the legislative history demonstrates that the Congress did in fact base its classification upon its assessment of the relative equities of the various classes involved. See pp. 19-22, *supra*.

It is equally irrelevant whether the lines drawn by the Congress were the most reasonable or perfect that could have been drawn. "Even if the classification involved here is to some extent underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance* v. *Bradley*, *supra* at 108. This Court has "repeatedly stated that there is no constitutional requirement that 'a statutory provision filter[] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.'" *Califano* v. *Boles*, *supra* at 4877. The existence of other alternatives is "irrelevant to the equal protection analysis," *Vance* v. *Bradley*, *supra* at 103 n. 20, even if such an alternative could be said to be "constitutionally preferable." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 73 (1978).[42] See also, *e.g.*, *San Antonio School District* v. *Rodriquez*, *supra* at 51.

And, it is irrelevant whether the "line drawn by Congress is longer than necessary to protect the fiscal in-

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[41] Hence, the District Court erred in holding that "the rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact." See p. 26, *supra*.

[42] Hence, the District Court's reliance on its conclusion that other means of resolving the financial difficulties of the railroad retirement fund were available and preferable (see p. 26, *supra*) was improper.

tegrity of the program," and that "unnecessary hardship is incurred by persons just short of qualifying." *Matthews* v. *Diaz*, *supra* at 83. "[A]ny line must produce some harsh and apparently arbitrary consequences," and the "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, [the Court is] especially reluctant to question the exercise of congressional judgment." *Id.*, at 83-84.[43]

In the *Diaz* case, the Court upheld the constitutionality of a statute in which the Congress, in order to protect the financial integrity of the medicare program, disqualified from eligibility for medicare benefits all aliens who had not both been admitted for permanent residence in the United States and a continuous resident of the United States for five or more years. That was not irrational since "those who qualify under the test Congress has chosen may reasonably be assumed to have a greater affinity with the United States than those who do not," so that "[i]n short, citizens and those who are most like citizens qualify," while "[t]hose who are less like citizens do not." *Id.*, at 83. In this case, those who qualify for a preserved windfall benefit "may reasonably be assumed to have a greater affinity with the [railroad industry] than those who do not," so that, in short, career railroad employees and "those who are most like" career railroad employes qualify, while those "who are less like" career railroad employees do not. That dis-

[43] Hence, the District Court erred in giving weight to its conclusion that members of the "Plaintiff Class" reasonably relied upon receiving a windfall benefit (see p. 26, *supra*), and its findings concerning the injury to the "Plaintiff Class" (J.S. App. 24a-26a) are irrelevant.

tinction, like the distinction made in *Diaz*, obviously is not irrational in the context of a statute primarily intended to provide "benefits for persons who pursue careers in the railroad industry."

5. We have noted in connection with the above discussion a number of errors in the lower court's equal protection analysis. See ns. 38, 41-43, pp. 35, 39-40, *supra*, and accompanying text. It is perhaps worthwhile to mention separately, however, what we regard as the most fundamental error made by the District Court in that regard. That is its conclusions to the effect that a purpose of the Congress in the 1974 Act was "to protect completely" the rights of all persons who had qualified under both the railroad retirement and social security systems as of December 31, 1974, and that the "Congress was unaware" that the Act "adversely affected the Plaintiff Class." See p. 26, *supra*.

We have shown that those conclusions, and the related findings concerning a purported misleading of the Congress by members of the Joint Committee, are contrary to fact.[44] The legislative history, as well as the language, of the 1974 Act make entirely clear that the Congress knew exactly what it was doing in regard to windfall dual benefits including the fact that such a benefit would not be preserved for the group that included the "Plain-

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[44] We have also shown that the purported breach by the union representatives on the Joint Committee of their duty of fair representation is without basis in fact or law. See pp. 30-32, *supra*. But even if such a breach had occurred or the Joint Committee had sought to mislead the Congress, that would be irrelevant. This Court established long ago, in an opinion by Chief Justice Marshall, that "a legislative act, which the legislature might constitutionally pass" will not be invalidated "in consequence of the impure motives," including even corruption, of either those who sought the legislation or of "members of the legislature which passed the law." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 131 (1810). See also, *e.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508 (1975); *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968).

tiff Class" except insofar as they had qualified under both systems by the end of the year in which they left railroad service. See pp. 26-29, *supra*.

Thus, there is no basis for those conclusions by the District Court or for the similar arguments by Fritz, which permeated his Motion to Affirm (see pp. 9-18), to the effect that "the discrimination against the appellee class" violated "one of Congress's basic purposes for the 1974 Act—the preservation of dual benefits for all 'vested' railroaders" (*id.* at 9-10) and that "the requirements which divested the plaintiff class," at the best, "were not fully explained or understood" and, at the worst, were "accomplished . . . by misleading and confusing Congress as to the nature of the changes" (*id.*, at 11).[45] We note, moreover, that since there is a rational basis for the distinctions made by the statute it would not make any difference if "the benign purpose of the [1974 Act] encompasses this case," as "legitimate rea-

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[45] The completely unjustifiable lengths to which this argument has been pressed by counsel for Fritz is exemplified by the contention, in his Motion to Affirm (pp. 16-17), that Mr. Dempsey, in testimony after the enactment of the 1974 Act, "continued to obfuscate the issue" and failed "to explain clearly that some vested beneficiaries were protected while others were not . . . ." In fact, Mr. Dempsey in that testimony specifically addressed the fact that, "under the [1974] act as it stands," a person who "did not have enough social security service . . . to quality for a social security benefit" at the time "he left the railroad service" does "not get the frozen windfall dual benefits," even though by "1975 he qualified or would have qualified under both systems." And, he went on to explain what, in his opinion, constituted "justification for this difference" in the Act's treatment of such persons as compared to those for whom a windfall dual benefit was preserved. Hearings on S. 3662 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. (1976), at 49-50. The continued view of the Congress as a whole that "this difference" is justified is indicated, moreover, by the fact that the bill by Senator Domenici "which would have repealed the dual benefit denial," referred to on p. 16 of the Motion to Affirm, was not enacted by the Congress or even reported out by a congressional committee.

sons justify the limits that Congress placed on it," *Califano* v. *Jobst*, *supra* at 56, and this would be true even if the Congress had been unaware of the statute's effect upon the "Plaintiff Class." *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 87-89 (1977).

6. None of the cases cited by Fritz in his Motion to Affirm either contradict the principles asserted above or otherwise support the decision on appeal. *Maher* v. *Roe*, 432 U.S. 464 (1977), *Califano* v. *Jobst*, 434 U.S. 47 (1977), and *Califano* v. *Aznavorian*, 439 U.S. 170 (1978), upheld the statutory classifications involved and support the arguments made herein to the extent that they are at all relevant. See Motion to Affirm, at 7, 18. *U.S. Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973), apparently was cited (Motion to Affirm, at 18) for its holding that an amendment to the Food Stamp Act could not be justified on the ground that legislative history indicated that it "was intended to prevent so-called 'hippies' and 'hippie-communes' from participating in the food stamp program," since "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (Emphasis by the Court). There is no basis, in the legislative history of the 1974 Act or otherwise, for a contention that the classifications at issue here were motivated in any way by "a bare congressional desire to harm a politically unpopular group . . . ." *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), cited on p. 18 of the Motion, both concerned statutes penalizing exercise of the constitutional right to travel interstate, and thus involved applications of "strict scrutiny" rather than of the rational-basis doctrine which is applicable here.[46] See pp. 33-34, *supra*.

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[46] *Maher* v. *Roe*, *supra* at 474-475 n. 8, and *Califano* v. *Aznavorian*, *supra* at 176-177, are among the numerous subsequent decisions by this Court so distinguishing *Shapiro* and *Maricopa County*. The two lower-court decisions cited along with *Shapiro* and *Maricopa*

CONCLUSION

For the reasons stated herein and in the brief filed by the Government, this Court should reverse the decision by the District Court.

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County (Motion to Affirm, at 18) apparently have been cited for their reference to *Shapiro* or to a quotation from another lower-court opinion which had cited *Shapiro*, and are equally irrelevant to the decision in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD, *Appellant,*

v.

GERHARD H. FRITZ, *Appellee.*

On Appeal From The United States District Court For The Southern District Of Indiana

BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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The Court noted probable jurisdiction of this appeal in an order entered February 19, 1980. Jurisdiction of the appeal is granted by 28 U.S.C. § 1252. This *amicus* brief is submitted to the Court pursuant to Rule 42(b), written consent of the parties having been obtained.

INTEREST OF AMICUS CURIAE

The motion for leave to file the *amicus* brief in support of the Jurisdictional Statement describes the deep interest of the Railway Labor Executives' Association, as the association of all railway labor unions representing all classes and crafts of railway employees, in any

matter, including this case which affects the basic pension system for railroad employees.

The Railroad Retirement Committee of the Railway Labor Executives' Association served as the labor members of the Joint Labor-Management Railroad Retirement Negotiating Committee and was intimately involved in the design of the legislative proposals to restore the financial integrity of the railroad pension system. The threat to the continuing existence of the Railroad Retirement program was so severe during the period of this legislation that radical restructuring was essential if the system were to survive. In the course of the consideration of this legislation, the windfall or dual benefit, defined in the Jurisdictional Statement and in this brief, was identified as the single cause for the then impending financial collapse of the program.

It was thus apparent to the members of the Joint Committee established by the Congress and to the Congress that the Railroad Retirement system could no longer tolerate the continuance of this unique element. The result was the elimination of the dual benefit, but in so doing the Congress prescribed a savings clause for those railroad employees with respect to whom the Congress identified a federal obligation. Financing of this vestigial element was to be undertaken by the Federal Treasury. It was in this area that lines had to be drawn and were drawn based upon long standing and traditional considerations applied by the Congress throughout four decades of Railroad Retirement legislation. Although there may have been options with respect to the manner of drawing lines of this nature, the distinctions made by the Congress in defining the "grandfathered" clause were hardly irrational. Moreover, if the decision below is not reversed, it will

destroy the delicate balance drawn by the Congress in the "grandfathered" class, and will require an additional $2.38 billion expenditure over the next twenty years. (Jurisdictional Statement, p. 15, n.8).

STATEMENT OF THE CASE

In *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979), Mr. Justice Blackmun characterized the Railroad Retirement Act of 1974 (88 Stat. 1305, 45 U.S.C. §§ 231-231t (1976 ed.)) "in its modern form," as reflecting "both a private pension program and a social welfare program" providing two tiers of benefits reflecting this dichotomy. "The upper tier, [the Railroad Retirement or staff component] like a private pension, is tied to earnings and career service . . . . The lower, and larger tier of benefits [the Social Security component] corresponds exactly to those an employee would expect to receive if he were covered by the Social Security Act." *Hisquierdo* at 574.

More importantly, the Court further noted in *Hisquierdo* that "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, or even eliminate, them at any time" (at page 575). It should be stressed, however, that the Railroad Retirement system is a closed system, historically supported through Railroad Retirement taxes paid by employees, and by the railroads. Similarly, the costs of administration of the Railroad Retirement Board are supported exclusively by the railroad industry through the payment of railroad taxes so earmarked.

This case involves the treatment by Congress in 1974 of those hybrid or unique benefits called dual benefits resulting from the interplay of the Railroad

Retirement Act and the Social Security Act (42 U.S.C. §§ 301 *et seq.*); that is, from the employment of an employee in railroad work and non-railroad work either concurrently or at differing points in his employment history. Prior to 1974, a railroad employee could acquire Social Security credits through daily or weekly employment following the conclusion of his hours or days of railroad employment (a practice which has sometimes have been referred to as "moonlighting"), or an employee could have accumulated sufficient quarters for Social Security coverage through non-railroad employment prior to or subsequent to his railroad employment. In either case, sufficient quarters of coverage in his non-railroad employment together with sufficient years of service in his railroad employment would have and did result in vesting under each of these systems.

In these cases, the Social Security benefit plus the Social Security equivalent within the railroad retirement benefit will always exceed the amount of a Social Security benefit which would have been paid if based on combined railroad and non-railroad earnings. Stated in terms of the Railroad Retirement Act of 1974, the Social Security component of the Railroad Retirement benefit based on railroad earnings (Tier I) plus the Social Security benefit based on non-railroad earnings, calculated separately, will exceed the amount of the benefit which would have been payable if both the railroad and non-railroad service had been combined in a single Social Security calculation.

The windfall or excess dual benefit, which is the subject of this proceeding, is the difference between these two sums, that is, (1) the amount by which the sum of the separate Social Security benefits, one based

on railroad service only and one based on Social Security service only, exceeds (2) the single benefit based on the combined railroad and social security service.

The flawed coordination of the two systems resulting in the payment of this windfall benefit during the decades prior to the challenged 1974 legislation had the unfortunate result of draining the railroad account of approximately $4 billion.

In 1974, it was established that the actuarial deficit of the Railroad Retirement system had escalated to $529 million each year or 9.05% of the 1974 payment. $451 million of this annual shortfall or 7.72% of payroll was directly attributable to the windfall benefit. It was recognized by the Joint Committee and by the Congress that a deficit of these enormous dimensions, if untreated, would destroy the railroad pension system within a short period of time. The Committees in each Branch of the Congress agreed "that resolution of the so-called 'dual' benefit is central both to insuring the fiscal soundness of the Railroad Retirement system and in establishing equitable retirement benefits for all railroad employees." H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974) p. 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974) p. 11 (hereinafter referred to as "Committee Reports" where the reports are substantially identical in substance or in pagination).

The Committee Reports recognized that "the most difficult proposal in this regard, involves the manner in which the dual benefit should be phased out on an equitable basis" and thereafter proceeded to define the operation of the savings provision with its lines of demarcation establishing the "grandfathered class." Committee Reports at p. 11.

The Committee Reports explained that since the "deficit in the railroad retirement system has occurred because of Congressional action," with respect to Social Security legislation (as well as an earlier Congressional repeal of restrictions on dual benefits), the bill, as reported, provided "that appropriations be made to cover the costs of phasing out dual benefits" as delineated by the savings provisions; that is, that the cost of supporting the circumscribed dual benefit programs, estimated on a level basis of $285 million through the year 2000 or $7 billion 1974 dollars, should be absorbed by the Federal Treasury and not by Railroad Retirement fund which lacked the capacity to carry this heavy burden. Committee Reports at pp. 4 and 5.

It was on this precise point that President Ford rested his veto of the 1974 legislation. In his veto message of October 4, 1974, he stated that "This bill proposes to solve the financial problems of the Railroad Retirement system by placing a seven billion dollar burden on the general taxpayer, requiring him to contribute $285 million to the Railroad Retirement Trust Fund for the next 25 years." Legislative History of the Retirement and the Railroad Unemployment Insurance Systems, Railroad Retirement Board (1978) at page 470.

The House of Representatives overrode the veto by a vote of 360 to 12. The override vote in the Senate was 72 to 1. Legislative History, *supra* at 472.

It was subsequently determined that the $285 million estimate of the cost of maintaining the phased out dual benefit within the limits of the savings provision had been calculated on a static basis; that is, without allowance for inflation. Current recalculation on a level basis through the year 2000, adjusted for in-

flation, made by the Comptroller General of the United States places the dual benefit cost figure at $415 million per year over a 21-year period or approximately $8 billion. As noted above, the redrawing of the line by the District Court would increase this figure by an amount of $119 million for each of the next 20 years or approximately $2.4 billion overall.

Congress has yet to appropriate the full amount of this phase out cost as defined by the Act, and as recalculated by the Railroad Retirement Board in its 14th triennial actuarial evaluation.

ARGUMENT

The District Court's decision utterly failed to comprehend the nature and purpose of the restructured Railroad Retirement legislation. Further, the District Court ascribed a lack of knowledge on the part of the Congress which does not bear analysis when the legislative history is examined. Finally, and most importantly, the District Court usurped the legislative power of the Congress by judicially amending a validly drawn and constitutionally permissible statute. Fundamentally, this case involves a judicial disagreement with a proper legislative judgment.

The District Court correctly held, and appellee does not contest, that this case does not involve a fundamental right or a suspect classification. *See, e.g., San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 16-39 (1973). Therefore, the only basis for the District Court's opinion is that the legislation at issue manifested a patently arbitrary classification, utterly lacking in rational justification. *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959); *Cf., Weinberger* v. *Salfi,* 422 U.S. 749,

768 (1975) (Fifth Amendment due process requirements are fulfilled if Fourteenth Amendment equal protection standards are met.)

The District Court, in deciding that the delineation by the savings provision in Section 231(n) of the Railroad Retirement Act excluding the members of appellees' class from the "grandfathered class" had no reasonable relation to the purpose of the statute (J.S. App. 30a) failed completely to perceive the nature and purpose of the restructured legislation. Nothing could be clearer than the perception by the Congress that the precipitous slide of the Railroad Retirement system into insolvency and eventual bankruptcy was due almost entirely to the growing weight of the dual benefit, resulting from the amendments to the Social Security Act as well as the repeal of earlier legislative restrictions on dual benefits.

As this Court noted in *Hisquierdo,* the obligation to pay dual benefits was and is not contractual, but may be altered at any time, as it had been in the past, or even eliminated, as it was by the 1974 Act.

In abolishing dual benefits in 1974, the Committee of the Congress reported to their respective Bodies that "a windfall no longer will be possible except insofar as the bill preserves benefits for those beneficiaries or employees whose equities entitle them thereto." Committee Reports at p. 11. The Committee Reports then characterized the problem of structuring the "grandfathered" class "whose equities entitle them" to limited preservation as "most difficult." The reports thereupon proceeded to explain precisely how the lines were proposed to be drawn.

It nowhere appeared that Congress was intent upon protecting "completely" the expectations of all persons, regardless of their attachment to the railroad industry, so long as they were fully insured under Social Security and had accumulated at some point in their working lives at least ten years of railroad service.

The contrary is the fact. The delineations and classifications were explicit and clear.

The problem of identifying financial resources other than Railroad Retirement for the support of the preserved dual benefit was obviously a most severe one, witness the position of the Administration on this point as reflected in President Ford's message on his veto of the bill, described above.

The delineation of the "grandfathered" class based upon attachment to the railroad industry so deliberately drawn by the Congress on the precedents and policies in other aspects of the Railroad Retirement Act throughout its legislative history is obviously rational and is intimately related to the legislative purpose to eliminate the financial drain which threatened the continued existence of the Railroad Retirement System. It was clear from the very beginning of the legislative deliberations that the dual benefit had to be abolished. The Congressional concern was over the extent and manner of the phase out, if indeed there was to be one. Because cost was an overriding factor and since it could not in any sense be borne by the Railroad Retirement Account, the problem was to find a new source of funds for that part of the program which was to be maintained on the foregoing basis.

In selecting the Federal Treasury as the new source for financing the phased out benefits, the Congress drew

lines recognizing equitable entitlement in a way most compatible with the appropriation concerns which so deeply troubled the Administration.

It is not the office of the Judiciary to cavil with the Congress over what would have been the best legislative choice. Yet that quite clearly appears to be the true basis of the District Court's decision. Not being required to fund the Act's requirements, the District Court has redrawn the statute to make it more equitable in its own perception. In so doing, the District Court essentially usurped the power of the Congress. For just as surely as Congress could have eliminated the benefits altogether (*Hisquierdo, supra*), so too could it draw rational lines in eliminating the overpowering burden of the dual benefit. *New Orleans* v. *Dukes,* 427 U.S. 297, 305 (1976). The fact that the District Court did not agree with those lines is of no consequence.

The Congressional judgment must be permitted to stand where the lines drawn are not patently arbitrary, and particularly where the effect of the District Court's redrawn statute would be to further drain the Treasury in such burdening sums.

CONCLUSION

For the reasons stated herein, and for the reasons stated in the briefs of the Government and the National Railway Labor Conference, this Court should reverse the District Court's decision.

Respectfully submitted,

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APPELLANT

GERHARD H. FRITZ,
On behalf of himself and all others similarly situated,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF T. W. SMITH, *ET AL*, AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF T. W. SMITH, *ET AL*, AS AMICUS CURIAE

By consent of Appellant and Appellees submitted herewith, T. W. Smith, *et al*, file this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The amicus curiae, T.W. Smith, E.P. Gray, V.W. Baulch, John J. Kocian, Archie Dewees, L.C. Story, W.S. Smith, A.E. Morris, L.E. Frank, J.J. Herndon, E.J. Le Blanc, W.A. McMichael, W.A. King, S.A. Keasler and V.W. Walker, have an interest in this case in that they are Plaintiffs in a case now pending in the

U.S. District Court for the Northern District of Texas, Dallas Division, styled T.W. Smith, *et al* v. William P. Adams, Chairman, United States Railroad Retirement Board, CA3-78-0236-G. The question presented in that case is the same as the question presented in this appeal. That case has been stayed until final disposition is made of this appeal. The amicus curiae are not members of the certified class only because they have not yet retired. The interests of the amicus curiae are typical of those of literally thousands of former railroaders who have been divested of their earned retirement benefits by the enactment of the Railroad Retirement Act of 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set out in the Brief for the Appellant.

QUESTION PRESENTED

Whether Section 3(h) of the Railroad Retirement Act of 1974, 45 U.S.C. 231b(h), violates the Due Process Clause of the Fifth Amendment because it divests Appellees of benefits to which they were entitled under the Railroad Retirement Act of 1937 on a basis which is arbitrary, capricious, and irrational.

STATEMENT

The Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* (hereinafter referred to as the "1974 Act"), was enacted as a response to concerns about the financial stability of the Railroad Retirement Fund established by the Railroad Retirement Act of 1937, 45 U.S.C.

228(a) *et seq.* superceded by 45 U.S.C. 231 *et seq.* (hereinafter referred to as the "1937 Act"). The Railroad Retirement System's financial difficulty was recognized in 1970, at which time the Commission on Railroad Retirement (hereinafter referred to as the "Commission") was created by Congress to study the problems. Pub. L. No. 91-377, Section 7, 84 Stat., (Aug. 12, 1970). The written report was received by Congress on September 3, 1972, and such report dealt with the financial instability of the Railroad Retirement System, and proposed certain means for correcting that instability.

After the Commission submitted its written report, Congress requested representatives of the railroad unions and representatives of management of the railroad carriers to submit recommendations to the House and Senate regarding reforms of the 1937 Act. No recommendations were sought (nor have any ever been sought) from any representative of the Appellees. Prior to the time that the Commission began preparing its reports, the employers for all Appellees herein or the Appellees themselves had withdrawn from participation in the Railroad Retirement System. However, at such time all Appellees had contributed to the Railroad Retirement System for more than ten years, but less than twenty-five years, and under the terms of the 1937 Act, had a fully vested right to retirement benefits subject only to reaching the applicable retirement age and filing the appropriate applications.

Based upon the recommendations of the Commission, the railroad unions and railroad management, the 1974 Act was enacted on October 16, 1974, and became effective January 1, 1975. The revisions in the law made by the 1974 Act substantially decreased the benefits to which the Appellees were entitled under

the 1937 Act without effecting the benefits of other classes of railroad employees. In some cases, the 1974 Act even increased benefits to which other classes are now entitled.

It is obvious from the legislative history of the 1974 Act that the Appellees, as former railroad employees not being currently members of any railroad union, were not notified of the Commission's reports and their interests were totally ignored, except to the extent that the benefits due them from the Railroad Retirement Fund were drastically reduced in order to maintain levels of benefits equal to or greater than those already available to employees still connected with the industry.

The 1974 Act combined the benefit systems of the 1937 Act and the Social Security System in such a fashion that railroad employees, such as the Appellees herein, are no longer entitled to benefits under both programs even though they had been assured for years by the Appellant that both programs were available to them and had been further assured that substantial and full retirement benefits of a vested nature would flow from their employment under and payment into the two programs.

A summation of the 1974 Act and its effect on the Appellees is as follows:

1. The Appellees constitute a group of former railroad employees who, as of December 31, 1974, had more than ten but less than twenty-five years of credited railroad service, but who were not directly connected with the railroad industry as of December 31, 1974.

2. All railroad employees, former and present, who were classified as vested under the 1937 Act will, by means of the 1974 Act, receive those benefits to which they were entitled under the 1937 Act, except for the Appellees.

3. The Appellees have lost the benefits to which they were entitled under the 1937 Act by reason of the additional requirements the 1974 Act placed upon the Appellees for qualification to receive the benefits to which they were entitled under the 1937 Act. Those additional requirements, none of which the Appellees can comply with, are (i) twenty-five years of railroad service prior to 1975, or (ii) permanent insured status under the Social Security Act, 42 U.S.C. 401 *et seq.* prior to 1975, and on the date that they left active railroad service.

Under this statutory scheme, a former railroad employee situated as the Appellees herein, with twenty-four years of railroad service, will lose his vested benefits under the 1937 Act. At the same time, a railroad employee with only ten years of service as of December 31, 1974, and "currently connected" with the industry, will be entitled to full credit for his railroad employment and, in effect, receive much higher benefits in accordance with the provisions of the 1937 Act.

SUMMARY OF ARGUMENT

Arbitrary, capricious and irrational discrimination violates the United States Constitution. The 1974 Act discriminates against Appellees in such a manner because it divests them of benefits to which they were eligible under the 1937 Act without rational basis.

Under the 1937 Act, Appellees were eligible for both Social Security and Railroad Retirement benefits. The 1974 Act eliminated these dual benefits for Appellees by providing that Social Security benefits be offset against Railroad Retirement benefits. Dual benefits are retained, however, for employees who had a "current connection" with the

railroad industry as of December 31, 1974. Appellees have earned, paid for and relied upon the benefits of which they are now divested.

One of the stated purposes of the 1937 Act was to provide security for Railroad workers whose private pension benefits were discretionary. The Commission recognized this purpose when it recommended to Congress that persons with legally vested dual benefits (i.e., Appellees) be allowed to receive them. However, a Joint Labor-Management Railroad Retirement Negotiating Committee (hereinafter referred to as the "Committee") composed of representatives of railroad workers with a "current connection" with the railroad industry submitted a report to Congress which eliminated Appellees' benefits but retained full benefits for those with a "current connection" with the industry.

The sole intent of the 1974 Act was to make the Railroad Retirement fund actuarially sound with due regard for the equities of vested beneficiaries. However, the 1974 Act has the effect of totally divesting Appellees of vested benefits while totally preserving vested benefits for those persons "currently connected" with the Railroad industry. Discriminating against Appellees on this basis is not rational in light of the intent of the 1974 Act.

ARGUMENT

Arbitrary, capricious and irrational discrimination against any class of persons is prohibited by the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. *Califano v. Goldfarb*, 430 U.S. 199 (1977). The 1974 Act arbitrarily, capriciously and irrationally discriminates against Appellees. No rational basis exists

for divesting these former railroaders of their benefits vested under the 1937 Act. Appellees, on or before December 31, 1974, had satisfied all of the eligibility requirements for benefits under the 1937 Act in that they had completed at least ten years of service on that date and were entitled to receive a retirement annuity pursuant to the 1937 Act upon reaching the applicable retirement age and filing the appropritate application. All Appellees have also satisfied the elegibility requirements under the Social Security Act and are also entitled to Social Security benefits upon reaching the applicable retirement age and filing the appropriate application.

Under the 1937 Act, an individual engaging in covered employment under both the 1937 Act and the Social Security Act was entitled to benefits under both acts if he had sufficient credits under each act to meet at least the minimum requriements for benefit eligibility. The Appellees have sufficient credits under both Acts to be entitled to benefits under both Acts upon reaching the applicable retirement age. The 1974 Act eliminated the dual benefits provided by the 1937 Act and the Social Security Act by providing that Social Security benefits would be an offset against Railroad Retirement benefits in computing benefits. Dual benefits would be retained under the 1974 Act through the payment of an additional amount of so-called "windfall" benefits to those railroaders and former railroad employees meeting certain vesting requirements under the terms of the 1974 Act which are different than those of the 1937 Act.

Appellees, although having met all requirements under the 1937 Act, do not meet the additional vesting requirements imposed by the 1974 Act for "windfall" dual benefits, and have thus been deprived of a valuable vested interest guaranteed to them under the 1937 Act.

The Appellees contributed to the Railroad Retirement Fund for many years and under the terms of the 1937 Act, justifiably expected to receive amounts greatly in excess of those to which they are now relegated under the 1974 Act.

In 1977 this Court rendered its decision in *Califano v. Goldfarb*, 430 U.S. 199 (1977), which was a suit challenging the survivors' benefits provisions under the Federal Old Age Survivors and Disability Insurance Benefits (OASDI) program of the Social Security Act, 42 U.S.C. 401-431. Perhaps more than any other Supreme Court ruling, the language in this case enunciates the principals surrounding the Equal Protection component of the Due Process Clause of the Fifth Amendment.

In *Goldfarb*, the issue concerned the constitutionality of Section 402(f)(1)(D) of the Social Security Act, 42 U.S.C. 402(f)(1)(D). Under the Act, survivors' benefits based on the earnings of a deceased husband covered by the Act were payable to his widow regardless of dependency, but under the aforementioned section such benefits on the basis of the earnings of a deceased wife covered by the Act were payable to her widower only if he was receiving at least half of his support from her upon her death. In holding this provision of the Social Security Act an unconstitutional denial of equal protection, the Court, quoting from *Weinberger v. Wiesinfeld*, 420 U.S. 636 (1975), Stated the following:

> . . . Wiesenfeld held that the fact that the interest is "non-contractual" does not mean that "a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from that employment."

Califano v. Goldfarb, 430 U.S. 199, 211, and 212 (1977)

The 1974 Act is in direct contravention of the Court's holding in *Wiesenfeld* and *Goldfarb*. The 1974 Act has the effect of depriving one group of employees of substantial benefits while maintaining those benefits for others who have contributed no more than the Appellees.

By way of example, under the 1937 Act if two employees had served in the railroad industry for twenty years as of 1974, they would be entitled to equal benefits upon their retirement. The 1974 Act destroyed such equal treatment by adding, after the fact, the additional vesting requirements referred to above and has substantially reduced the benefits payable to the Appelles even though, as of 1974, they had contributed the exact amount of money as their contemporaries who had a "current connection" with the railroad industry in 1974.

Furthermore, one of the stated purposes of the 1937 Act was to provide security to railroad workers whose benefits under private pension programs had frequently been treated as discretionary payments. See H.R. Rep. No. 1711, 74th Cong., 1st Sess., 10-11, (1935).

> The drafters of the original legislation expressly stated that one of the important features of any retirement plan was a guarantee to the worker of an 'absolute' right to receive the pension.

See also *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Congress, by the enactment of the 1974 Act, has defeated the express purpose of the 1937 Act and has undertaken to treat as discretionary the benefits to which the Appellees were entitled under the 1937 Act.

Although there has been no express holding that former railroad employees may be divested of accrued

benefits under the 1937 Act, the court below has applied the rational basis test to its determination of whether or not the 1974 Act violates the Due Process Clause and its incorporated Equal Protection guarantee. The rational basis test was first announced in the case of *Flemming v. Nestor*, 363 U.S. 603 (1960). Although the Railroad Retirement Act, unlike the Social Security Act, contains no express provision permitting Congress to terminate it, and, therefore, should be the subject of a much more stringent test than the rational basis test, assuming arguendo, that the rational basis test is the proper test to be applied in the instant case, a review of the 1974 Act clearly demonstrates that no rational basis exists for divesting Appellees of their vested benefits under the 1937 Act while maintaining such benefits for all other present and former employees.

As stated previously, a Commission on Railroad Retirement was created under the direction of Congress in 1970 to study the actuarial soundness of the Railroad Retirement Fund. Pub. L. No. 91-377, Section 7, 84 Stat. 791.

The Commission recommended that the Railroad Retirement System and the Social Security program be more closely coordinated, and that dual benefits under the Railroad Retirement and Social Security Act, *in the future*, be eliminated and that only present beneficiaries and those with legally vested dual benefit rights be allowed to receive dual benefits. The Appellees, having qualified for benefits under both acts, were naturally included in those beneficiaries held to have legally vested benefits. Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972). In its report the Commission made the following specific recommendations with

regard to those legally vested dual benefit rights to include the Appellees:

> Recommendation 9-2: (a) the following principals with respect to vested rights should be followed in instituting changes to eliminate further accrual of rights to windfalls in dual OASDI benefits on the basis of future service:
>
> (1) Individuals or families on beneficiary rolls should be permitted to continue to receive the present dollar amounts of their RR and OASDI benefits, but the RR staff portion of their benefits should not be subsequently increased as long as this guaranteed portion exceeds the amount which would be yielded for the same service and average pay under the new formula. They should, however, be allowed all increases provided by the Congress on the basic OASDI portion of their benefits.
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> (2) Individuals who are permanently or fully insured under Social Security, and are or will be eligible to retire under Railroad Retirement within a year should have a reasonable opportunity to exercise such rights. If they exercise them they should be treated the same as those under point 1.
>
> (3) Individuals who have vested rights to Social Security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under Railroad Retirement , should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits, as described in Chapter 11. However, the

> Railroad Retirement staff tier portion of such guaranteed benefits should not be subsequently adjusted as long as it exceeds the benefits under the new staff tier formula. If the new second or staff tier Railroad Retirement formula then in effect provides a more attractive benefit, they should be permitted to elect the new formula benefits.

Had the 1974 Act been written upon the basis of the recommendations of the Commission as outlined above, the Appellees would be receiving the benefits to which they are entitled.

The 1937 Act stood as a guarantee to American railroad workers from their government that retirement benefits counted on, earned and paid for over the years would not be taken from them. The Commission recognized and was faithful to this commitment in its recommendation to Congress. Yet, when the 1974 Act became law, Appellees found themselves singled out to be stripped of previously vested retirement benefits. How did such an inequity come about? Here's how.

After the filing of the Commission's final report, the Committee, composed of representatives of railroad labor and management (all with a "current connection" with the industry), was formed to prepare and submit a report to Congress. No representatives of the Appellees were asked to participate in the preparation of this report and its contents could have been easily predicted. As one would expect, this report recommended that Appellees' benefits be completely eliminated while full benefits for those "currently connected" with the industry (i.e. those whose representatives prepared the report), were maintained or increased.

The Chief Negotiator, while effectively divesting the Appellees of what the representatives of management termed "legally vested rights", called such divestiture "a refinement upon the recommendations of the Commission." H.R. 15301, 93rd Cong., 2d Sess. 164 (1974), at 168.

In part he stated:

> The first group would be comprised of those employees with a 'current connection' with the railroad industry — 12 months of railroad service out of the previous 30 months as defined in the 1937 Act and in the bill — either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service even though without such a 'current connection'. The Joint Negotiating Committee concluded that the service with and attachment to the railroad industry of such employees are sufficient to afford them an equity in windfall dual benefits substantially equivalent to the equity of existing beneficiaries. Accordingly, under the bill this group also would receive, upon retirement, a windfall benefit based upon service and compensation prior to January 1, 1975. The amount thus determined would be subject to increase prior to retirement by reason of cost-of-living increases in the level of social security benefits during that intervening period, but would be frozen upon retirement, as would be done in the case of dual beneficiaries retired as of December 31, 1974.
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> The second group would be comprised of employees who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection

> to the railroad industry. Such employees, the Joint Negotiating Committee believed, have a lesser equitable claim than those who have remained with the railroad industry. Accordingly, under the bill they would not receive a windfall dual benefit, upon retirement, unless they also had fully qualified under Social Security by the close of the year in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid.) If they had so qualified under both systems at that point, however, they would receive a windfall benefit, upon retirement, calculated as of the time they left railroad service, and subject to cost-of-living increases in the level of social security benefits after 1974 and prior to retirement. That windfall benefit would be frozen upon retirement, as in the case of other dual beneficiaries.

This self-serving "logic" resulted in the inequities which are now before this Court for rectification. Men and women who have contributed to the Railroad Retirement Fund for up to twenty-four years but who did not have a "current connection" with the railroad industry as of 1974 have been divested of earned and expected benefits upon which they and their families have relied. At the same time, persons who have contributed substantially less time to railroading and money to the Railroad Retirement Fund as of December 31, 1974, but who as of such date had a "current connection" with the railroad industry, are termed to have a right more equitable than the Appellees. This result is not only irrational and inequitable, it is absurd.

Congressional discrimination against a class of persons, in order to pass constitutional muster, must have a rational relation to the purpose of the legislation and

cannot be arbitrary or capricious. Contrary to the undocumented assertions of Appellant, constructed after the fact to provide some rational basis for the inequities dealt to Appellees, the sole intent of the 1974 Act was to make the Railroad Retirement Fund actuarially sound with due regard to the relative equities of those beneficiaries whose interests had already vested under the terms of the 1937 Act, including Appellees. H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972). How can it be logically argued that the equities of these beneficiaries have been recognized when the effect of the 1974 Act is to preserve, totally, the vested rights of one class of persons and to divest, totally, the rights of another class of person equally entitled to the same benefits?

Appellant would have the Court believe that the sole (and supposedly rational) basis upon which the Appellees have been divested of their rights under the 1937 Act is because, as of December 31, 1974, they did not have a "current connection" with the railroad industry. Using solely a "current connection" as the rational basis upon which to either continue or divest persons of accrued benefits leads to obviously ridiculous and inequitable results. For example, under the rationale imposed by the Appellant herein, an employee with ten years of service who had a "current connection" with the railroad industry as of December 31, 1974, would be entitled to full and dual benefits under both the Social Security and Railroad Retirement Funds. However, under the same rationale, a person with twenty-four years of railroad service, i.e. the Appellees, who happened to not have a "current connection" with the industry as of December 31, 1974, for whatever reason, have been completely divested of all of their accrued and vested rights under the 1937 Act which they have worked and paid for for periods of up to twenty-four years.

CONCLUSION

The sole intent of Congress when it passed the Railroad Retirement Act of 1974 was to render the Railroad Retirement Fund actuarially sound without inequity to those with vested benefits under the Railroad Retirement Act of 1937. Because of the self-serving recommendations of the Joint Labor-Management Railroad Retirement Negotiating Committee, Congress divested Appellees, as a class, of earned and vested benefits. The sole criterion for inclusion in this class is the lack of "current connection" with the railroad industry of December 31, 1974. The court below correctly held this discrimination against Appellees to be an arbitrary, capricious and irrational classification in direct violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The judgement of the district court should be affirmed.

Respectfully submitted,

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